TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 569

FRANK TOT, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 5, 1942.

CERTIORARI GRANTED JANUARY 11, 1943.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellant's Brief

In United States District Court, District of New Jersey

Criminal No. 197c

The United States

vs.

Frank Tot

Docket Entries

1940

July 23—Indictment for Violation of Federal Firearms Act &c.
" 29—Bench Warrant issued.
Aug. 1—Bench Warrant returned (not executed).
Nov. 29—Hearing before Hon. Albert L. Watson, U. S. Dist. Judge, on motion on demurrer.
" 29—Decision reserved.

1941

Jan. 3—Opinion overruling Demurrer &c filed (Watson).
" 22—Trial moved before Hon. Thomas Glynn Walker, Judge.
" 22—Ordered Jury drawn. Ordered Jury sworn. Jury sworn.
" 22—Swearing 5 witnesses.
" 22—Ordered motion to suppress denied.
" 22—Ordered motion for direction of verdict of Not Guilty denied.
" 22—Ordered recess 1 to 2 P. M.

1941 [fol. 2]

Jan. 22—Ordered motion for direction and dismissal of Indictment denied.
" 22—Swearing Deputy Marshall Gyarmati & Bailiff McLaughlin.

1941

Jan. 22—Ordered clerk take verdict in absence of Court.
" 22—Ordered Marshall provide supper for Jurors.
" 22—Ordered bail continued in case of verdict of Guilty.
" 22—Verdict—10 P. M.—Guilty.
" 22—Ordered defendant to appear for sentence Feb. 11, 1941, at 10 A. M. and bail continued.
" 22—Requisition of witnesses. Issuing 1 subpoena. Issuing 1 copy.
" 23—Subpoenas returned (1).
" 27—Trial continued before Hon. Thomas Glynn Walker, Judge.
" 27—Motion to dismiss.
" 27—Swearing 1 witness.
" 27—Decision reserved.
Feb. 11—Ordered off to Feb. 19th, 1941.
Mar. 17—Ordered off 1 week.
Mar. 24—Hearing before Hon. Thomas Glynn Walker, Judge, on motion to set aside verdict and grant a new trial.
" 24—Court reserved decision.
" 31—Order continuing sentence to April Term, 1941, filed (Forman) (Sundry 261a).
Sept. 8—Order continuing sentence to September Term, 1941, filed (Forman) (Sundry 335a).
Oct. 29—Hearing before Hon. Thomas Glynn Walker, Judge, on motion to set aside Verdict and for a new trial.

[fol. 3] 1941

Oct. 29—Ordered term is continued until Court decides the motion (Walker).
Nov. 4—Order continuing sentence to November Term, 1941, filed (Forman) (Sundry 372a).
Dec. 6—Memorandum denying motion to set aside verdict and defendant to present himself for sentence, Monday, 12/15/41, filed (Walker).
" 6—One copy to Attorney General.
" 22—Sentence—Two years in a U. S. Penitentiary, custody Attorney General &c (Walker).
" 22—Ordered that a certified copy of this signed judgment serve as the commitment of the defendant (Walker).

1941
Dec. 22—Warrant of commitment issued. Duplicate.
" 22—Ordered bail fixed at $3,500. on appeal (Walker).
" 22—Notice of Appeal filed.
" 23—Stipulation filed.

IN UNITED STATES DISTRICT COURT

INDICTMENT

UNITED STATES OF AMERICA,
District of New Jersey, ss.:

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1940.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

That on or about the 20th day of September in the year 1938, at the City of Newark, in the County of Essex and [fol. 4] State and District of New Jersey and within the jurisdiction of this Court, one

FRANK TOT

whose true and correct name, except as above set forth, is to the Grand Jurors unknown, he having been theretofore on the 22nd day of June A. D. 1925 duly convicted in the Special Sessions Court of the County of Essex, in the State of New Jersey, before Honorable Edwin C. Caffrey, Judge of the said Court, of a crime of violence, to wit, assault and battery with intent to beat, wound and ill-treat one James Johnson, and the said Frank Tot having been on the 15th day of June 1932 duly convicted in the Quarter Sessions Court of the County of Essex, in the State of New Jersey, before Honorable Walter D. Van Riper, of a further crime of violence, to wit, breaking and entering at night into the office building of Guardsmen's Building and Loan Association with intent to steal, to wit, burglary, did knowingly, unlawfully and feloniously receive a certain firearm, to wit, a thirty-two calibre Colt automatic pistol, which said pistol

had been shipped and transported in interstate commerce to the said City of Newark from a place to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Title 15 § 902 f.)

William F. Smith, Acting United States Attorney.

[fol. 5] In United States District Court, District of New Jersey

Testimony

United States of America

vs.

Frank Tot, Defendant

Testimony

Appearances:

Irwin L. Langbein, Esq., Special Assistant to the Attorney General and

William F. Smith, Esq., United States Attorney for the Government.

George R. Sommer, Esq., for the Defendant.

Tried before Hon. Thomas Glynn Walker, Judge, and a jury on Wednesday, January 22, 1941 at 10 A. M. at the Post Office Building, Newark, New Jersey.

• • • • • • •

Mr. Sommer: He does. If your Honor please, at this time, for the purpose of the record, may I state that a motion was made referring to this particular indictment before Judge Watson; the motion was to cross the indictment on several grounds. That motion was denied in a written opinion of Judge Watson which was handed down within the last week or two, and I would like now for the purpose of the record to be allowed to enter an objection

[fol. 6] to the opinion and ask that an exception be allowed to his ruling.

The Court: The record will show same.

(Exception allowed.)

Forman, [L. S.] U. S. D. J.

Mr. Langbein: Opened on behalf of the Government.

JOHN L. MADALA, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Langbein:

Q. What is your occupation, Mr. Madala?

A. I am a Special Agent of the Federal Bureau of Investigation, Department of Justice.

. . . . . .

Q. Directing your attention to the period on or about September 22, 1938, where were you stationed?

A. I was stationed at Newark, New Jersey.

Q. Are you acquainted with a man named Frank Tot?

A. Yes, sir, I am.

Q. Will you point him out, if you see him?

Mr. Sommer: Stand up.

A. That is the man.

Mr. Langbein: Indicating the defendant Frank Tot.

Q. Did you see Frank Tot on or about September 22, 1938?

A. Yes, sir, I saw him on the morning, early morning of September 22, 1938.

[fol. 7] Q. About what time?

A. I will say about 7 A. M.

Q. And where did you see him?

A. I saw him at his home 182 E. Kinney Street on tne 2nd floor.

Q. In what city?

A. Newark.

Q. Right here. Was anyone else present with you at the time that you saw him?

A. Special Agent Abraham Dickstein, Special Agent R. J. Flynn and Special Agent L. F. Malone, all of the Federal Bureau of Investigation.

Q. Was there any search of Mr. Tot's house made on that date in your presence?

A. Yes, sir, there was.

Q. Did you have a warrant?

A. Yes, sir, I did.

Q. I ask whether that is the warrant?

A. Yes, sir, it is.

Mr. Langbein: Offered in evidence.

Mr. Sommer: At this time I would like to cross examine this witness as to this particular piece of paper.

The Court: You may do so.

Cross-examination.

By Mr. Sommer:

(As to Warrant.)

Q. This is not a search warrant, it is?

A. No, sir.

Q. But it is a warrant for the arrest of Frank Tot?

A. That's right.

Mr. Sommer: No objection.

(Received and marked Exhibit G-1.)

Direct examination (resumed).

By Mr. Langbein:

Q. Was anything found in the search of the premises?

A. Yes, there was.

Q. What was it?

Mr. Sommer: Now, I object to any question as to the result of the search or what was found for the reason that [fol. 8] the search was made of a private dwelling without a search warrant, as has been definitely stated by this witness.

The Court: I am overruling the objection.

Mr. Sommer: I pray an exception and ask leave to renew my motion at the end of the Government's case.

The Court: That request is granted.

(Exception allowed and sealed accordingly.)

Forman, [L. S.] U. S. D. J.

A. We found, among other things, a .32 calibre Colt automatic pistol.

Q. Is that the gun? (showing the witness a gun.)

A. Yes, sir.

Mr. Langbein: I offer the gun in evidence.

Mr. Sommer: Of course I object to the admission of the gun upon the same grounds as the previous motion. I assume there will be the same ruling.

The Court: The objection is overruled.

(Received and marked Exhibit G-2.)

Q. Mr. Madala, have you had, in the course of your duties with the Federal Bureau of Investigation, opportunity and occasion to become familiar with the names of guns and their calibres?

A. Yes, sir, to a certain extent.

Q. Can you tell us what the brand name of this gun is?

Mr. Sommer: Well, now, I object to that, the gun speaks for itself.

[fol. 9] The Court: I will permit him to answer it yes or no.

A. It is a Colt .32 calibre.

The Court: No, the question is can you?

The Witness: Yes, sir, I can.

Q. Please tell us——

Mr. Sommer: Now, I object to that.

Q. (Continuing:) What make and calibre——

Mr. Sommer: The gun speaks for itself.

Mr. Langbein: If the Court please, I suppose that at some point on the gun there is a label bearing its name and number, its calibre and number, then a serial number; but the jury isn't familiar with guns. They may not be able to find it and I think that by way of explanation, a simple

statement from the witness who is familiar with such matters would be far superior to having them try and find it for themselves.

The Court: I will overrule the objection.

Mr. Sommer: I am willing to stipulate that the revolver that the witness is holding in his hand, which is marked G-2, is a .32 calibre Colt automatic pistol.

Mr. Langbein: Well, fine. That would be the purpose of my question, to obtain just that information.

Q. Now, can you find a serial number on the gun?

A. Yes, it is indicated there (indicating).

Q. Will you read it out, please?

A. 310977.

[fol. 10] Q. Now, did you have any conversation with the defendant Frank Tot with respect to the gun at the time you found the gun?

A. Yes, sir, I did.

Q. What is that?

A. I did.

Q. Will you tell us what that conversation was?

A. At the time we entered the place and began our search, after he was under arrest, I asked him whether he had a pistol in the room, and he said he did, and I asked him where it was. He says, "Well, I will get it for you." I told him just to tell me where it was and we would get it ourselves. So he told us it was in his coat pocket which was hanging in the wardrobe closet in the bedroom where he was located. I went over to his wardrobe closet and examined the clothes and found this gun in the outside coat pocket of one of his coats. We took the gun out of the pocket and he was watching us and said, "Be careful, it is loaded." So Mr. Dickstein in my presence ejected the magazine which was fully loaded and also pulled back the bolt and found that there was a bullet in the chamber which we ejected right away and then took posses. ion of the gun.

Q. Now, where was Tot, in which room of the house?

A. In the same room.

Q. Where was he when you arrested him?

A. He was in bed in the bedroom and this wardrobe closet was in the same room.

Q. Do you have the magazine and bullets to which you refer?

A. This is the magazine which was in the gun, and as I recall, there were eight cartridges in the magazine and one in the chamber. These are the bullets. There are only six in that.

Q. Only six left?

A. Yes, sir.

Mr. Langbein: I offer the bullets.

Mr. Sommer: Same objection.

The Court: They will be received and marked as one exhibit. How many are there?

[fol. 11] Mr. Langbein: Six bullets.

(Received and marked Exhibit G-3.)

Mr. Langbein: Also the magazine.

(The magazine is received and marked Exhibit G-4.)

The Court: You have objected to the bullets, have you the same objection to the magazine?

Mr. Sommer: Same objection to the magazine.

The Court: Overruled.

Q. That is all.

Cross-examination.

By Mr. Sommer:

Q. Now, on the morning of September 22, 1938, you and four other agents went to the premises 182 E. Kinney Street, Newark, did you not?

A. I and three other agents.

Q. You and three other agents.

A. Yes, sir.

Q. Two of you remained in the front of the house and you and Dickstein went to the rear of the house, didn't you?

A. I think that's right, yes, sir.

Q. And you and Dickstein went up the rear stairs to the 2nd floor of the house, did you not?

A. Yes, sir.

Q. And you then knocked on the door, did you?

A. Yes, sir.

Q. Who opened the door?

A. He did.

Q. Tot did?

A. Yes, sir.

Q. So that when you entered the place he was not in bed at all, was he?

A. He was undressed, I presume he got out of bed.

Q. He was not in bed when you entered that place, was he?

A. No, he was not when he entered the door, he wasn't.

[fol. 12] Q. Well, you know he opened the door, don't you?

A. Yes, sir.

Q. And Agent Dickstein was in charge of the raid, wasn't he?

A. I don't know whether anyone was in charge.

Q. Well, the warrant was in his possession, wasn't it?

A. It was in his possession.

Q. And you went there for the purpose of arresting Tot and searching the premises, didn't you?

A. Yes, sir.

Q. And when Tot opened the rear door to the house, did anyone speak to him?

A. Either Dickstein or myself told him we had a warrant for his arrest.

Q. And you asked him whether he was Frank Tot, didn't you?

A. Yes, sir.

Q. And he admitted his identity?

A. Yes, sir.

Q. And you placed him under arrest?

A. That's right.

Q. Now, into what room does the rear door lead?

A. I believe it is the kitchen.

Q. And in the kitchen you had a conversation with him, didn't you?

A. I don't recall offhand. If you refresh my recollection I may remember it.

Q. Well, after you placed him under arrest the other two agents entered the front of the building, didn't they?

A. I think either Dickstein or myself let them in.

Q. That's right. They came up the front stairs.

A. Yes, sir.

Q. And you went to the front door and let them in?

A. I believe that's right.

Q. And then you proceeded to search the place?

A. Well, yes, shortly, thereafter, yes, sir.

Q. And Dickstein remained in the kitchen with Tot, didn't he?

A. Not during the entire search.

Q. When you started the search.

A. No, he was sitting on the bed or lying in bed; he was—no, he was sitting on the bed with his clothes off. We told him to get dressed, as I recall, in the bedroom.

[fol. 13] Q. Now, as a matter of fact, didn't you bring a suit out of the bedroom and give it to him in the kitchen and didn't he dress in the kitchen?

A. No, my recollection is he dressed in the bedroom. The reason I know that is because we wouldn't go and make the search without the presence of the defendant, so he must have been in the room at the time we made the search in the bedroom.

Mr. Sommer: Now, I move that that be stricken as not responsive.

The Court: May I have the answer?

(Answer repeated by the reporter.)

Mr. Langbein: If the Court please, I don't see anything objectionable in the response. It goes on to explain the grounds of knowledge.

The Court: I will strike from the words "The reason" including said words.

Q. While you were in the kitchen and Dickstein was talking to Tot, he asked him if he had a revolver, didn't he?

A. No, that conversation took place in the bedroom. He was in bed, sitting on the bed dressing, I believe.

Q. Sure it didn't take place in the kitchen?

A. No, I am positive now that you brought it up, that he was in the bedroom sitting on the bed.

Q. If Dickstein testified at a previous hearing in this matter that that conversation took place in the kitchen, then he was incorrect?

A. If he so testified that is his recollection. My recollection is that he was in the bedroom.

Q. And of course this all occurred over two years ago?

A. Two and one-half years ago.

Q. And you say there was a wardrobe in the bedroom?

A. Sort of a wardrobe closet, my recollection.

[fol. 14] Q. And in that closet there was clothing, was there not?

A. Yes, there was several pieces of apparel.

Q. And you opened the closet?

A. Oh, yes.

Q. And you searched the clothing in the closet?
A. Oh, yes.
Q. And in the pocket of one of the coats in that closet you found the revolver which is marked G-2?
A. Yes, sir.
Q. Now, did you have any further conversation with Tot at that time concerning the gun?
A. I asked him if the gun belonged to him.

Mr. Langbein: Object—well, go ahead.

Q. And how did he answer that?
A. He said it did.

Mr. Langbein: Just a moment. I have no objection to that question but when I have an objection pending——
The Court: Withhold your answer until counsel is able to state his objection, if he has one.

Q. Did you have any further conversation with him pertaining to the gun?
A. I asked him where he got it from.
Q. And what did he tell you?

Mr. Langbein: Objection.
The Court: What is the basis for your objection?
Mr. Langbein: That is part of the defense, it seems to me. It is not open now on cross examination, it opens up an entirely different topic. We are resting on the presumption.
Mr. Sommer: Might I say this, your Honor, that the Government, Mr. Langbein on his direct examination asked this witness whether he questioned the defendant Tot about [fol. 15] a revolver. I think I have a right to bring out all of the conversation that took place in that question.
Mr. Langbein: Only insofar as it is relevant to qualify the answers made on direct. There is no rule that you are entitled to bring out everything and anything that may have happened in the conversation.
The Court: I am inclined to sustain the objection.
Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, [L. S.] U. S. D. J.

Mr. Langbein: Of course I will have no objection to having Mr. Sommer, if he wishes, make Mr. Madala his own

witness provided whatever testimony there may be there is otherwise admissible.

The Court: Well, we can solve that problem after the Government rests.

Q. Now, the charge that you went there for the purpose of arresting Tot on was not a charge of possession of firearms, was it?

A. No, sir.

Q. That charge was made on a complaint either made by you or Dickstein, wasn't it?

A. Yes, sir, by Agent Dickstein.

Q. And did you ever prosecute Tot on that charge?

A. I don't know. I haven't been in this territory for a year.

Q. Up to the time you left this territory had you ever prosecuted Tot on that charge?

A. I had no knowledge.

Q. Do you know whether there was ever any further proceedings on that charge at all?

A. All I know is hearsay testimony, hearsay information.

[fol. 16] Mr. Langbein: I object to any further questions along this line. I have given counsel latitude on it.

The Court: The objection is sustained.

Q. And Tot, after his arrest and after the search of his apartment, was taken up to your headquarters, was he not?

A. Yes, sir.

Q. And then finally arraigned and charged with the possession of this revolver?

A. Yes, sir.

Q. And prior to going to your headquarters you went to his garage and searched that, didn't you?

Mr. Langbein: Objection.

The Court: I will permit him to answer. I don't know what materiality there is to it.

A. I don't remember searching the garage myself.

Q. That is all.

Mr. Langbein: No further questions. If the Court please, without any preliminaries I offer under the Official Documents Rule certified copy of the record from the Essex County Clerk's Office purporting to bear the usual signa-

tures and seals and purporting to be a transcript of the records of the Court of Quarter Sessions, I believe it is.

The Court: Is it the Guardsman matter?

Mr. Langbein: One is a Guardsman matter.

The Court: That is a Quarter Sessions matter.

Mr. Langbein: And the other——

The Court: Is the Johnson matter?

Mr. Langbein: I will have to ask your Honor to bear with me a moment while I identify this.

The Court: Certainly.

Mr. Langbein: The other is an assault and battery matter. Now, may I speak at side bar, please?

[fol. 17] The Court: You may.

(Colloquy at side bar with Mr. Sommer and the Court.)

(Proceedings resumed within hearing of the jury.)

Mr. Sommer: In so far as the first of these two is concerned, I object to its admission on the ground that on the face of it he was not convicted of a crime within contemplation of the statute. In so far as the second one is concerned, I object to its admission because on the face of it it shows that he was not convicted and did not plead guilty to the charge.

The Court: By the first and second I understand, Mr. Sommer, you are referring to——

Mr. Sommer: The assault and battery case and the breaking and entering case.

Mr. Langbein: If the Court please, as to the first, the assault and battery, it appears from the face of the record that the charge is of beating, wounding and ill treating a certain named person which, it seems to me, is obviously a violent thing to do. You don't beat, wound and ill treat quietly. As to the second, a plea was entered, a plea of non vult which is, in contemplation of law, equivalent to a plea of guilty, and a judgment thereon, is, in contemplation of law, a judgment of conviction.

The Court: May I see the certified copy. The Court has examined the certified copies and has removed that dealing with the December 18, 1934 case. Same forms, no part of this case, is not covered by the indictment and cannot be received in the matter. Certified copies offered deal with the [fol. 18] assault and battery, and the breaking and entering more particularly set forth in the indictment returned by

the Grand Jury, and both show a conviction and they are received and will be marked.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, [L. S.] U. S. D. J.

(Received and marked Exhibit G-5.)

Mr. Langbein: If the Court please, may I ask that this be noted as taking place at side bar. May I ask to have the extra one marked for identification? I may need it.

The Court: Yes, you may make the offer.

Mr. Langbein: I wanted the record to show that these papers, dealing with carrying a pistol charge, are the papers which the Court has detached from the certification, and I will ask to have them marked G-6 for identification. I am not offering them.

(Marked Exhibit G-6 for identification.)

Mr. Langbein: That is the Government's case, your Honor. Government rests.

Mr. Sommer: I ask that the jury be excluded for the purpose of a motion.

The Court: Yes. Ladies and gentlemen of the jury, you may retire to the jury room. Yes, Mr. Sommer.

Motion to Suppress Evidence

Mr. Sommer: I first move to suppress the evidence which was the result of the search in this matter upon the follow-
[fol. 19] ing grounds: The agent that was on the stand has admitted that he, together with three other agents, went to the premises in question with two thoughts in mind and with the determination to do two things, arrest the defendant Frank Tot and search his home. They had a warrant for his arrest but did not have a search warrant. Two of the agents remained in the front of the house and two went to the rear. The two that went to the rear of the house knocked on the door and were admitted by the defendant Tot into the kitchen. They asked him who he was. He told them. They told him that they had a warrant for him and they placed him under arrest. That took place in the kitchen and there could be no doubt from the witness' testimony that at the place where he was placed under arrest, even in that room, there was no revolver. But subsequently,

going into another part of the house where they had no right to go going into a bedroom, a considerable period of time subsequent to the arrest, because he testified that he went to the front of the house and let the other agents in and then came through the house, there was, according to his statement, a conversation with the defendant Tot, that he had a gun, that the gun was in a pocket of a coat which was in a wardrobe which wardrobe was closed; he offered to get it for them, and of course they very sensibly refused his assistance and found the gun. Now, if the gun had been on his person or if it had been very close at hand in the room where he was placed under arrest, then there would be no question but that they would have a right to seize the same; but it was neither in his possession nor was it in the room where he was arrested. This question was very clearly decided [fol. 20] by the United States Supreme Court in the case of Lefkowitz against United States, 285 U. S. 452. In that case agents or officers of the Government armed with a warrant went to the place of business of Lefkowitz, announced the fact that they had a warrant for his arrest, placed him under arrest and then proceeded to search the adjacent room to the room in which they placed him under arrest; and the Supreme Court there said that searches for evidence in places or rooms other than the room in which a person is arrested are exploratory searches and cannot be made where there is a warrant for the person's arrest, and that person has been placed under arrest. And in the Lefkowitz case the Supreme Court suppressed the evidence.

Now, there is an opinion in this case by Judge Forman. There, if your Honor will examine it, your Honor will find that immediately upon the defendant being arrested according to the finding of fact, he was asked whether he had a revolver and it was found to be hanging in a coat nearby which would, from a reading of it at least, indicate that the coat was in the same room in which he was arrested and the revolver was readily available to him. Under the testimony here we have a totally different situation. I could cite to your Honor dozens of cases that I think are clearly in point, but I think the Lefkowitz case is entirely dispositive of the matter as is the case of Gobart Company *vs.* United States in 282 U. S. 344.

Now, of course your Honor's ruling upon this motion, or depending upon your Honor's ruling upon this motion would depend whether or not a motion for a directed verdict

[fol. 21] should be made because a motion for a directed verdict would be based upon totally different grounds and would be dependent first upon whether or not the revolver was permitted to remain in evidence. So may I withhold that awaiting your Honor's decision on this argument?

The Court: You may.

Mr. Langbein: If the Court please, on the question of illegal search and seizure, it seems to me that the basic rule on search and seizure is, as Mr. Sommer, I believe, has suggested, that you cannot go search for evidence. Your search and seizure has to be incidental to something else, even when you go in with a search warrant, and the question is what was this incidental to. Here the agents went in to search the house, but of course not to search for a gun, as they testified, and as the search warrant itself shows. The search warrant is in evidence.

Mr. Sommer: That is no search warrant.

Mr. Langbein: Oh, I beg your pardon. They went in to search the house, but, they went in to search the house on another charge, and it is perfectly clear from the face of the arrest warrant what the purpose of that search was. The arrest warrant recites that there is an allegation that the defendant Tot aided and abetted in the theft of some merchandise. Obviously they were looking for some merchandise. The gun when found was found in the course of something else preparing the defendant to get dressed, go up to the U. S. Commissioner's office and be arraigned. The finding of the gun took place in the course of ordinary police precaution in the custory of a prisoner. Finding [fol. 22] a gun under those circumstances on the prisoner's own invitation, it seems to me, is not at all like the usual search for evidence that is condemned in Gobart, Lefkowitz and half a dozen other cases. For that reason I believe that the finding of the gun took place in a perfectly proper manner and that the evidence of the finding of the gun should not be suppressed.

Mr. Sommer: Might I say this, your Honor, just in answer to Mr. Langbein; there are a number of decisions, one Amos *vs.* United States in 255 U. S. 313 and Doops *vs.* United States, 275 U. S. 142 and those cases hold, together with the Herda case, 27 Fed. (2nd) 521, that the defendant did not object to the search of the premises and in assent aided the officers in their search by telling them where they could find that for which they inquired, was not a waiver

of his constitutional rights because peaceful submission after a display of authority by officers cannot be construed as a waiver of such rights.

The Court: Mr. Sommer, in the Gobart case what did they find and what did the Supreme Court suppress?

Mr. Sommer: In the Gobert case my present recollection is rather vague as to what they found. In the Lefkowitz case they found a lot of papers.

The Court: Had they been taken at the time of the crime?

Mr. Sommer: No.

The Court: They were connected with the crime; they weren't the proofs of the crime, were they?

Mr. Sommer: They were evidence to help prove an offense.

[fol. 23] The Court: Now, in the case reported in 255, 313 what was seized?

Mr. Sommer: I don't recall what, I don't recall what was seized in those cases. I believe that they were liquor cases, but what actually happened in those cases was this: The officers came to the house and displayed badges and said that they desired to search the premises, and the owner of the premises there in charge, talking to them, said, "Well, gentlemen, as long as you are here and you have a badge showing that you are an officer, I am perfectly willing to take you through the place and you may search it." But the Court there said that kind of submission to the search of a home is not a waiver of the constitutional rights which require the possession of a search warrant to search a home; and a warrant for arrest cannot be used for the purpose of going under those restrictions set up by the 4th and 5th Amendments to the Constitution.

Mr. Langbein: May I answer that briefly, your Honor?

The Court: Yes.

Mr. Langbein: It has never yet been decided whether the Amos case which, of course, is the leading case on this question of submission and consent and acquiescence turns or does not turn on the fact that it was a home. The treatment of the case, as you can see, if you scrutinize the language in the lower court, indicates that the case turned on the fact that the particular person who may have acquiesced there was a woman. However, we don't put this case alone on acquiescence, we put it on the theory, as I stated when I argued the matter for the first time here, on the acquiescence [fol. 24] as being a mere incident of a police precaution that

would ordinarily be taken when you were getting a man his clothes to dress him to take him down to be arraigned.

The Court: The evidence before the Court indicates that the seizure was made at the time of arrest. It was made at the place where the arrest was made, namely 182 E. Kinney Street, Newark, N. J., in which premises, and more particularly the 2nd floor thereof—and it was on the 2nd floor that the arrest was made—the defendant Frank Tot lived. The seizure can be distinguished from the cases cited by counsel for the defendant in that the revolver, the bullets and the magazine marked in evidence and identified as Exhibits 2, 3 and 4 for the Government, are things which could be used to effect an escape from custody, and there an exception, in the opinion of this Court, to the rule enunciated by counsel for the defendant and relied upon by him.

Mr. Sommer: I pray an exception to your Honor's ruling.

(Exception allowed and sealed.)

Forman, (L. S.) U. S. D. J.

MOTION FOR A DIRECTED VERDICT

Mr. Sommer: Now, at this time I move for a directed verdict on the ground that the Act under which this charge is laid and the particular section under which it is brought reads as follows: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice, to receive any firearm or ammunition which has been shipped or transported in interstate or foreign [fol. 25] commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."

There is no proof that this firearm was ever anywheres but in the State of New Jersey and through a presumption may exist under the statute that it was received, the Government must first prove that the gun was some place other than in the State of New Jersey.

The Court: Have you finished, Mr. Sommer?

Mr. Sommer: On that particular point.

The Court: The Court overrules you on that.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, (L. S.) U. S. D. J.

Mr. Sommer: The term firearm, as defined in the Act is defined as follows: "The term 'firearms' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action or an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon."

The words of the statute are clear. There are no commas present, but it says a weapon and a firearm silencer or muffler or any part or parts of such a combination. There is no proof before this Court that the revolver in evidence ever had a silencer annexed to it or that it would be possible to annex one to it. In view of the failure to show [fol. 26] that, then it cannot be a part or parts of the combination which the statute requires.

Now, on the question of construction of the statute and its meaning, let me say this to your Honor: The Act is written in clear, plain English, and does not seem to be the least bit ambiguous. From a mere reading of it, it says, using different wording, a "firearm" is a gun or a rifle or a revolver or a pistol and a firearm muffler or firearm silencer or any part or parts of such a combination. The word "and" is clearly used in the conjunctive and not in the disjunctive. Using it that way the Act refers to guns with silencers attached to them or parts of the combination and does not apply to guns for which there are no silencers or mufflers and which could not be a part of such a combination. It makes the muffler or silencer an integral and indispensable part of the firearm.

Now, this statute is a penal statute and the penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to justice and humanity that it be expressed in language which all can easily comprehend; that it be held obligatory only in the sense in which all can and will understand it. And this consideration presses with increasing weight according to the severity of the penalty. Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation: and every provision intended for the benefit of the accused for the same human reason, received the most favorable construction.

[fol. 27] Now, that law has been the fundamental law of this land practically since the inception of our method of jurisprudence.

The rule that penal laws are to be construed strictly is perhaps not much less old than the constitution itself. It is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is vested in Congress or the state legislature and not in the judicial department. It is the legislature or Congress, not the court, which is to define a crime, ordain its punishment and prescribe the procedure to be followed in the case.

Intent is the vital part, the very essence of the law. This is the intention embodied and expressed in the statute. A legislative intention to be efficient as a law must be set forth in a statute, it is therefore a written law.

That has been the holding of the United States Supreme Court in U. S. *vs.* Goldenberg in 168 U. S., page 95 and Wabash Railroad Company *vs.* U. S. in 178 Fed. page 5.

How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is plain, certain and unambiguous so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless.

That was held in the case of Ruggles *v.* Illinois, 108 U. S. 526, and also in this state in the case of Water Commissioners *v.* Brewster, 42 N. J. Law 125.

The sole authority of Congress to make laws is the foundation of the principle that Courts of Justice are bound to [fol. 28] give effect to its intention. When that is plain and palpable they must follow its implicitly. The rules of construction, with which the books abound apply only where the words used are of doubtful import.

When there is no ambiguity in the words there is no room for construction. The case must be a very strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.

Even if a statute were ambiguous, the construction adopted should be that most favorable to the accused.

Referring now to the statute under consideration the words are plain, clear and definite and the only conclusion that can be reached is that it was the intention of Congress to regulate the transportation in interstate commerce of guns to which silencers could be affixed and silencers or mufflers and a combination of the two things and Congress did not intend to regulate against the transportation of all pistols and revolvers.

Now, your Honor will find that in 1934 Congress passed what was known as the Federal or the National Firearms Act. That statute differs completely from the Federal Firearms Act of 1938 which is the Act under which this case is brought. Your Honor will find in the book a number of decisions covering the question of the 1934 Act but that Act and this are completely different and apart. That Act applied to sawed-off shotguns and things of that class which [fol. 29] were considered weapons which were not known to the military sense; that is to say, that they were not known in the militia or in the army though possibly today there may be the use of some of those implements. It was intended to cover those that were known as gangster armaments. This statute was subsequently passed and I think that the reading of it clearly shows that it was not intended to cover every revolver that existed but, as it says, those that could be combined with a silencer or muffler. The term "silencer or muffler" mean exactly the same thing, both being a device attached to the end of a gun for the purpose of lessening the sound by allowing the gases to expel slowly; and in view of the fact that the Act is in the conjunctive, in view of the fact that there is no proof that it would be even possible to annex a silencer to this revolver, I respectfully move for a directed verdict of not guilty.

* * * * * * *

The Court: I think the matter can be decided at this time. Mr. Sommer, as I understand your argument, you say you have a weapon made up of two parts, that which is the revolver, shall we say, and to which revolver can be attached a silencer, and together they form a unit which is identified as the weapon, under the wording of the statute. That argument might have considerable merit if the statute did not continue with the words "or any part or parts of such weapon," which indicates to this court that the unit can be broken down and its two component parts can each be the subject of the statute, the revolver, which is a part, or the [fol. 30] muffler or silencer which is a part. You might say that the words "or any part or parts of such weapon" means the magazine for example; means the trigger; means the muzzle or the handle, but I don't believe the statute can be restricted to mean one or more, but less than all of the component parts, unassembled and shipped, shall we say, one or several, but less than all at a time.

I am of the opinion that the words, "or any part or parts of such weapon" means one or more and perhaps all, shipped one at a time or all at a time, shipped unassembled or assembled, and so the motion is denied.

Mr. Sommer: Might I just say this, your Honor? Your Honor has stated exactly what my contention is and your Honor apparently agrees with me very definitely by your statement, because it is my contention that the statute says a revolver and a silencer or any part or parts of that combination. Now, your Honor has just stated that that is your opinion and I agree with it, but the point that your Honor seems to have overlooked is that it is my contention that there is no proof before your Honor that it would be possible to attach to this weapon a silencer; and with the lack of proof that it would be possible to annex a silencer to this weapon it cannot be a part of that combination. That is my argument and I agree with your Honor on your construction of the statute, that it means a combination or any part or parts of that combination. But there is no proof that this could possibly be a part of the combination.

The Court: Mr. Sommer, what I said was that even assuming your argument, it is answered by the statute as I [fol. 31] interpret the statute. With respect to the argument that the revolver which has been received and is G-2 in evidence, that same can not have attached thereto a silencer or a muffler and that therefore it cannot be a part of the weapon referred to in the statute, nor can it be the weapon referred to in the statute—I am going to give that further thought. I don't think I can answer it without some additional thought.

Mr. Sommer: I might say at this time, if your Honor please, that I am definitely prepared to prove that this revolver could not be a part of such a combination.

. . . . . .

Mr. Langbein: I haven't yet made a motion, your Honor. We are still at the discussion stage and my suggestion is this, that if your Honor feels that decision of the case should turn on the part or parts clause, then I will make such a motion to meet the proof which I know that Mr. Sommer can adduce on it; that if the decision is not to turn on the part or parts clause but is to turn on the generalities to which I adverted in my main argument, those additional facts on both sides of the case are unnecessary

and it will therefore be unncessary for me to make any such motion.

The Court: That would be — ask made for the purpose of offering proof on a question which is one of law and need not be received before this case is submitted to the jury, and so the suggestion at the beginning, that is just before the trial started, that we continue and submit the fact question, if there is one, to the jury, which verdict [fol. 32] could be set aside in the event that the Court finds that the statute has not been met, seems the best way to proceed, unless I can arrive at a conclusion during the luncheon. We will send for the jury.

. . . . . .

(Afternoon Session)

(Mr. Sommer opened on behalf of the defendant.)

Frank Tot, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Sommer:

Q. Mr. Tot, in 1925 were you convicted of assault and battery?
A. Yes, sir.
Q And were you sentenced for that offense?
A. Yes.
Q. And did you serve your time?
A. Yes, sir.
Q. And in 1932 were you convicted of breaking and entering?
A. Yes, sir.
Q. You pleaded guilty to that charge or non vult, didn't you?
A. Non vult.
Q. And were you sentenced for that offense?
A. Yes.
Q. And did you serve your time on that sentence?
A. I got probation for it.

Q. Now, since 1932, have you been convicted of any offenses?

A. Liquor offense.

Q. Other than that have you been convicted of anything since 1932?

A. No.

The Court: What did you say, sir?

The Witness: A liquor offense.

Q. Where were you living in September 1938?

A. 182 E. Kinney Street.

[fol. 33] Q. And with whom did you live at that address?

A. My wife.

Q. And how long have you lived there?

A. Since our marriage.

Q. And when was that?

A. About—I am married about six years. It must be about '35.

Q. And prior to that where had you lived?

A. My mother's house.

Q. Where is that located?

A. Warwick Street.

Q. Newark, New Jersey?

A. Yes.

Q. And how long had you lived on Warwick Street prior to your marriage?

A. About fourteen or fifteen years.

Q. Now, on September 22, 1938 at about 7 o'clock in the morning where were you?

A. I was at the kitchen sink washing myself.

Q. And what happened?

A. Well, a couple of men sneaked up the porch by the back door and I had a little pup, and this here pup went to the door and door opens up by itself, it is so easy, it is unlocked. Of course my wife had went to work. She went to work before I did. Well, when I seen the shadow on the frosted glass on the door, I seen the shadow, I seen a man there, I says, "Come right in, the door is open," and Mr. Dickstein and this agent here showed me a warrant for my arrest.

Q. Now, I show you Exhibit G-1 and ask you if this is the warrant they exhibited to you?

A. I don't recall now.

Q. But they did show you a warrant?

Mr. Langbein: I didn't get the witness's answer.

Mr. Sommer: He said, "I don't recall whether that is the one."

Q. But they did show you a warrant for your arrest, is that correct?

A. Yes.

[fol. 34] Q. And did they give you the warrant to read?

A. Mr. Dickstein gave it to me.

Q. And did it charge you with aiding and abetting in the theft of merchandise in the form of Camel cigarettes?

A. Yes.

Q. Where did you go to read the warrant?

A. I sat at the kitchen table.

Q. Who remained in the kitchen with you?

A. This gentleman here and another fellow. There was four of them there.

Q. And while you were in the kitchen did you have a conversation with any of the agents?

A. Mr. Dickstein and this gentleman asked me if I had a revolver, a gun.

Q. What did you tell them?

A. I said, "Yes, in the bedroom, in the wardrobe, in one of my suits."

Q. And then what was done?

A. When I went to get up from the table two of the agents had guns in their pockets and they put it to me and I couldn't run into that bedroom.

Q. Now, who went in the bedroom?

A. Two of them, two of them went in there while two watched me.

Q. And how were you dressed at that time?

A. I had overalls on and in my undershirt.

Q. And did you get a suit to put on afterwards?

A. They asked me what suit I wanted out of the wardrobe and I told them a blue suit and they took it out and they threw it at me.

Q. Where were you when they threw it at you?

A. Between the kitchen and the bedroom door.

Q. Now, I show you Exhibit G-2, a revolver, and ask you to whom that revolver belongs. Look at it, to whom does it belong?

A. To me.

Q. And how long before September 22, 1938 did you have that gun in your possession?

A. I have had that a year before I was married, about a year.

[fol. 35] Q. And where did you get it?

A. Well, I got it off of one of the unfortunates that's around the dump.

Q. And that would be back around 1934 that you got it?

A. Something like that.

Q. From 1934 up until September 1938 was that gun always in your possession?

A. Yes.

Q. What kind of a neighborhood do you live in?

A. Well, a bad neighborhood, very bad.

Q. What do you mean by that?

A. Well, it is a colored section and there has been a lot of occurrences around there that isn't safe.

Q. And why did you keep this revolver in your home?

A. For protection.

Q. Now, on this charge that you were arrested on by these agents, have you ever been prosecuted for the offense mentioned in the warrant?

Mr. Langbein: I object, whether or not this man has been prosecuted is irrelevant.

The Court: How is that material?

Mr. Sommer: Only that the warrant is in evidence charging him with an offense and I think he has a right to show that he has never been indicted, tried or convicted on such an offense.

Mr. Langbein: If the Court please, that gets us off to collateral matters and it would then be up to us——

The Court: I don't see the materiality of it. I will sustain the objection.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, U. S. D. J. [L. S.]

Q. That's all.

[fol. 36] Cross-examination.

By Mr. Langbein:

Q. Mr. Tot, I believe you mentioned three convictions of crime on your direct examination, the assault and bat-

tery, the breaking and entering and a liquor charge, right?

A. Yes.

Q. Where was the liquor charge?

A. Flemington, New Jersey.

Q. No other liquor charges?

A. No.

Q. And that is charges in the state, in this state?

A. Yes, sir.

Q. Where you ever convicted of a crime out of this state?

A. As far as—I don't remember.

Q. You don't remember. Ever been in Massachusetts?

A. Yes.

Q. Any liquor conviction there?

A. I wasn't convicted.

Q. Oh, I see. You are sure of that now?

A. Well, I am quite certain. Do you want me to answer that in my own way?

Q. Yes, if you want to.

A. All right. Well, when I was wanted for the charge over here at Newark and I was up there, the Judge told me that he would throw that case out providing I would go back to Newark without extradition papers and I told him I was willing to come back to Newark and he threw that out.

Q. I see. Sort of a deal with the Judge?

A. Well, he told me if I go back to Newark without having extradition papers, he would throw that case out.

Q. When was that?

A. Nineteen—around 1930 or something, 1929 or '30, something like that.

Q. And will you jog your memory and see if you can tell us whether there are any other convictions in the state courts here in New Jersey?

A. Well, maybe you could remind me of some. I don't remember of any.

Q. Were you convicted in the state courts of New Jer- [fol. 37] sey of carrying concealed weapons, ever?

A. Why, I admitted that before.

Q. Oh, I see. This is carrying concealed weapons which you admitted?

A. That was admitted before conviction and tried and I was sentenced for it. That is the charge that I pleaded guilty to.

Q. Oh, well, let's get this straight. We have this conviction that we are talking about now carrying concealed weapons and you say you pleaded non vult to it?

A. That's right.

Q. Are you quite sure that you weren't tried on that?

A. On what?

Q. On this same charge that we are talking about.

A. What charge is that?

Q. The charge is carrying concealed weapons and convicted on it after a verdict of guilty.

A. What charge is that?

Q. The charge is carrying concealed weapons. I am sorry to have to keep you straight on all this, but——

A. When was that?

Q. I am referring to a charge of carrying a concealed weapon and on which you were found guilty after a trial and a verdict of guilty on June 22, 1925, is that right?

A. No, sir.

Q. That is not?

A. No, sir. I did not have a trial.

Q. You did not have a trial?

A. A jury trial if you mean that, I did not. I pleaded non vult for a Judge.

Q. And then if the official records of that court should show that you were tried by a Judge after a waiver of a trial by a petit jury, and that your application for trial by a Judge was granted, and that the Judge handed down a verdict of guilty after trial was moved, then the records of the court, if they so show, are in error?

A. Well, there was a party—he is not here now—the man [fol. 38] that defended me, and he was at the trial.

Q. But at any rate, whether you are right or the records of the court are right, you were convicted on that charge of carrying a concealed weapon in 1925?

A. On circumstantial evidence.

Q. Oh, I thought you pleaded guilty.

A. Yes, because I was a young boy at the time.

Q. I thought you were worried about the circumstantial evidence.

A. After I found out later on in years, I knew what it was, all right, it was too late.

Q. Well, let's get this straight now. Here is this one that you say you pleaded to and the records say that you

were convicted on, and then we have the assault and battery, and that is the one that you were convicted on and were sentenced on, right?

A. That's right.

Q. And then after that we have the breaking and entering?

A. Yes, sir.

Q. On which you took a plea and were put on probation?

A. Yes, sir.

Q. And then besides that we have the liquor charge down at Flemington; is that right?

A. That's right.

Q. And those are your only convictions, just those four: the Massachusetts affair was a deal?

A. Well, I wouldn't say it was a deal. I don't think you would call that a deal.

Q. But at least the Massachusetts affair was not a conviction?

A. No.

Q. How old are you, Mr. Tot?

A. 37.

Q. How ich education have you had?

A. 6th grade Grammar School.

Q. What do you do for a living?

A. I am a longshoreman.

Q. How long have you been a longshoreman?

A. Well, I have been since I am married. Previous to that too, a few months previous before I was married.

[fol. 39] Q. Were you a longshoreman at the time you got this gun?

A. I don't remember. I must have had it before I was a longshoreman.

Q. What is the name of this man you refer to as the unfortunate around the dumps?

A. Well, there is a lot of them around the dumps and you don't ask names down there.

Q. About when was it that you say you got this gun?

A. About '33 or '34, something like that.

Q. And this was an unfortunate?

A. That's right.

Q. What did you pay for the gun?

A. I gave the man a bottle of alcohol for it.

Q. Did you know whether that gun was stolen?

A. No, sir, I do not.

Q. Do you know whether that gun was used in a crime before you got it?

A. No, sir.

Q. Did you ever see the man since, this unfortunate?

A. If you go down there you would never see the same man twice. They move in and out. They go all over the country, I guess. You don't know where they go.

Q. Well, I take it your answer is that you never did see him?

A. No, I never did see the man again.

Q. That is all.

Mr. Sommer: At this time I would like to offer in evidence a letter from the Colt Patent Firearms Manufacturing Company.

Mr. Langbein: Is this put in evidence before the jury or in evidence for the purpose of identification for his Honor on a motion.

Mr. Sommer: Well, whether the Court will permit it to go to the jury is another question. I think it has to do with a question of law that the Court will have to decide.

The Court: Is there any objection?

[fol. 40] Mr. Langbein: I would just like to get the purpose of the offer straight.

The Court: If I understand the purpose of the offer, it is directed to a question of law.

Mr. Langbein: And it will not be put in, a completely irrelevant document which will have the function of confusing the jury.

The Court: Let me see it, gentlemen.

Mr. Langbein: I want to make my position clear, your Honor that it is a matter which will merely confuse the jury by injecting a new issue into the case.

The Court: This deals with the question of law and will not be given to the jury, it will be received for purposes of the Court.

Mr. Langbein: I have no objection.

(Received and marked Exhibit D-1.)

IRENE TOT, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Sommer:

Q. Mrs. Tot, you are the wife of the defendant in this case?

A. Yes, sir.

Q. And you live where?

A. 182 E. Kinney Street.

Q. And how long have you lived there?

A. Five years.

Q. And how long have you been married to the defendant?

A. Six years next month.

Q. Now, I show you Government Exhibit G-2, a revolver, and ask you whether you have ever seen that revolver before?

A. Yes.

Q. And where have you see- it?

A. In the wardrobe in my home.

[fol. 41] Q. And how long has the revolver, Exhibit G-2, how long was it in your home prior to September 22, 1938?

A. Always.

Q. Ever since you lived in the house?

A. Yes.

Q. That is all.

Cross-examination.

By Mr. Langbein:

Q. Have you ever been convicted of a crime, Mrs. Tot?

A. Yes.

Q. You have; what crime?

A. I don't remember now.

Q. You don't remember what crime it was you were convicted of?

A. No.

Q. Mrs. Tot, what is the serial number of this gun, do you know?

A. I wouldn't know. I never touched it.

Q. You never touched it. You are not an expert on guns?

A. No.

Q. Do you know what the brand of this gun is?

A. No, only from what I have heard today. I heard you mention Colt.

Q. Are you able to tell us definitely and certainly the way you appeared to tell us on direct examination, Mrs. Tot, that it was this gun that your husband had rather than some gun of the same make and calibre, general appearance or what not?

A. Well, I cannot tell you definitely, but it was one like it.

Q. It was one like it. It might have been some other gun?

A. Well, I don't know guns, one from the other.

Q. I see. All you are able to tell us is that your husband Frank Tot had a gun?

A. Yes, sir.

Q. How many times have you seen this gun, assuming it is the same gun, of course.

A. Well, I haven't really looked at it because I never bothered to look at those things. It was always in the wardrobe. That was all.

[fol. 42] Q. Well now, didn't you run across that gun if it was always in the wardrobe?

A. Well, I have nothing to do with my husband's suits; he takes care of his own.

Q. I see. The times when you saw it, it was in the wardrobe, is that it?

A. I have seen it now.

Q. Well, aside from now?

A. Well, I seen it once before when Frank changed it from the suit.

Q. When he changed it from one suit to another?

A. Yes, when he sent it to the tailor.

Q. And when you saw it it was always in a suit then, is that it?

A. Well, it was always in that one suit except the time he changed it once to send it to the cleaner.

Q. And you are unable to tell us even roughly, I take it, how many times all told you saw the gun?

A. No.

Q. That you think was this gun; and you are still unable to remember what crime it was of which you were convicted?

A. No.

Q. That's all.

Re-direct examination.

By Mr. Sommer:

Q. Just one question. The gun that was in the wardrobe on the morning of September 22, 1938 was the same gun that had been there right along, was it not?

A. Yes.

Q. That is all.

Recross-examination.

By Mr. Langbein:

Q. Just a moment. How do you know it was the same gun?

A. Because Frank had never used it.

Q. How do you know that he didn't swap guns, put another one in there?

A. Well, I was always home. He never done it while I was there.

Q. Your answer really is, so far as you know it is the same gun, isn't that it, but you don't really know?

A. Well, I am quite sure.

[fol. 43] Q. Well, now, you have just told us that; you didn't spend your life watching that gun?

A. No.

Q. You don't know whether it is the same gun. You just think so, isn't that right?

A. Maybe.

Q. That is all.

Jennie Tot, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Sommer:

Q. Miss Tot, you are a sister of the defendant?

A. Yes, sir.

Q. And you reside where?

A. 43 Warwick Street.

Q. Newark?

A Newark.

Q. And prior to your brother's marriage where did he live?

A. With us, 43 Warwick Street.

Q. And when was he married?

A. He was married six years ago.

Q. And after his marriage, where did he go to live?

A. 182 Kinney Street.

Q. You visited him there?

A. Quite often.

Q. And I show you Exhibit G-2, a revolver, and ask you whether you have ever seen this revolver before?

A. Yes, I did.

Q. Where did you see it?

A. In the wardrobe at home.

Q. On Warwick Street?

A. 43 Warwick Street.

Q. And did your brother keep it in his wardrobe at home prior to his marriage?

A. All the time.

Q. That is all.

Mr. Langbein: May I have the last question and answer, please?

(Last question and answer repeated by the reporter.)

[fol. 44] Cross-examination.

By Mr. Langbein:

Q. As I understand you, you have seen this gun both at the home where he lived before his marriage and at his home?

A. That's correct.

Q. Where he has lived since his marriage?

A. That's right.

Q. Kept in the wardrobe or in a wardrobe in both places?

A. Yes.

Q. Now, you heard Mrs. Tot testify that the gun was kept generally in a suit?

A. That's right.

Q. At the home where he lived after he was married, in the wardrobe?

A. That's right.

Q. Are you able to tell us where it was kept or how it was kept in the home where he lived before?

A. In both homes or just the one home?

Q. No, in the other home.

A. In his marriage home?

Q. Well, all right. First tell us does that accord with your own recollection that that was where he kept the gun after he was married?

A. Yes.

Q. Now, before he was married you say he kept the gun in the wardrobe but he also kept it in a suit?

A. Not in a suit, in a drawer.

Q. It was just after he was married that he took to keeping it in his suits, is that so?

A. I suppose so

Q. As far as you know?

A. Yes.

Q. Are you a gun expert?

A. Oh, I should say not.

Q. Then I take it you don't know either whether this is really the same gun that you say you saw?

A. Well, it reminded me of a water pistol; that is why I know it.

Q. I take it——

A. I don't mean I know it, but the name on it.

Q. The name Colt?

A. That's right.

Q. You know your brother had a Colt gun, is that it?

A. That's right.

[fol. 45] Q. Do you know how many guns he had all around?

A. How many guns?

Q. Yes.

A. I couldn't tell you. I saw only but one.

Q. Only one at a time?

A. One at a time. He wouldn't dare to bring it home if he had any, I mean.

Q. Then, what you know is that your brother used to have a Colt gun that looked like a water pistol?

A. One of those things just like you have in your hand.

Q. Did you live at Warwick Street too?

A. I still do.

Q. You still do; you and your brother lived there together, I take it?

A. Of course.

Q. Family home?
A. That's right.
Q. Did you see your brother buy this gun?
A. No.
Q. How often did you used to see this gun when it was at Warwick Street?
A. Every week I did the washing and ironing, I used to put his clothes in his drawer. I still do the washing and ironing.
Q. You would see the gun in the drawer?
A. That's right.
Q. Or to be more precise, you would see a gun in the drawer, right?
A. Of course, a gun.
Q. That you. That is all.

Mr. Sommer: That is all.
The Court: You may step down.
The Witness: A gun.
Mr. Sommer: That is all.
The Court: You may step down.
Mr. Sommer: We rest.
Mr. Langbein: One piece of rebuttal testimony, the representative of Colt Patent Arms Company.

[fol. 46] Robert E. Courtney, called and sworn in rebuttal on behalf of the Government, testified as follows:

Direct examination.
By Mr. Langbein:

Q. What is your occupation, Mr. Courtney?
A. I am employed by the Colt Patent Firearms Manufacturing Company, Hartford, Connecticut.
Q. I have subpoenaed you to produce the shipping record for a Colt automatic serial number 310977?
A. That's right.
Q. Do you have custody of shipping records?
A. Yes, they are made under my supervision and kept in my department entirely.
Q. How long have you worked for Colt?
A. 36 years.
Q. I asked you to produce the shipping record for gun number 310977. Do you have it?
A. Yes.

Q. It is in a volume rather than a separate record?

A. Yes, complete shipment made to——

Q. Well, just tell us from your records what the name of the issuee of that gun was when the gun was shipped?

A. Hibbard, Spencer, Bartlett & Company.

Q. And do you know where Hibbard, Spencer, Bartlett & Company is?

A. I do.

Q. Where is it?

A. Chicago, Illinois.

Q. And does your record show the date of the shipment?

A. Yes.

Q. When was it shipped?

A. September 23, 1919.

Q. I show you Government's Exhibit G-2, a gun, and ask you to examine it and see whether it corresponds with your record of shipment?

A. It does.

Q. Thank you.

[fol. 47] Cross examination.

By Mr. Sommer:

Q. Your record wouldn't show when it was shipped to the State of New Jersey, would it?

A. Oh, no.

Q. But it was shipped from your plant in 1919?

A. That's right.

Q. That is all.

Mr. Langbein: That completes our case on rebuttal, your Honor. The witness may step down.

The Court: Anything further, gentlemen? Both sides rest. How much time do you require?

Mr. Sommer: I have a motion that I would like to make.

The Court: The jury may retire.

(The jury retired.)

MOTION FOR A DIRECTED VERDICT

Mr. Sommer: I would now like to move for a directed verdict of not guilty and a dismissal of the indictment upon two grounds: First, upon the same grounds that I urged for a directed verdict or a dismissal of the indictment at the end of the Government's case, and I would like to have the Court consider my remarks then as being stated now without re-

peating them. And on the second ground which is as follows: There is no evidence or testimony before your Honor that this gun was shipped in interstate commerce subsequent to the enactment of this act of June 30, 1938. There is testimony before your Honor that it was shipped in interstate commerce in 1919 and lawfully so shipped. The Act says that the possession of a gun by a person who has been [fol. 48] convicted of crimes of violence shall be presumptive evidence that it has been shipped, transported or received in interstate commerce, as the case may be; that is merely a presumption. What the case may be has not been shown by the evidence and the indictment charges shipped and transported.

Now, a presumption is never evidence and a presumption ceases to be valid when evidence tending to show the actual facts is brought forth. That was decided in the case of Normandin *vs.* Parenteau, 150 Atlantic 460. Another case decided in New Jersey, the case of Robinson *vs.* Robinson in 90 Atlantic 311 held that it is impossible to predicate judicial action upon a presumption which is wholly repelled by the evidence.

Now, here we have a presumption created by statute in a criminal case which presumption is rebutted by direct testimony to the effect that this gun was in the State of New Jersey long prior to the enactment of the statute. The rebuttal evidence which the Government offered by the witness of the Colt Company only aids that rebuttal testimony. It shows that from 1919 this gun had been out in the public, away from the Colt Company, and I feel, in view of the two decisions that I have cited to your Honor, in view of the fact that there is no evidence whatsoever but a presumption which has been rebutted—credibility or not of witnesses is not to be taken into consideration, because the testimony offered conclusively shows, and not only tends to show as the cases hold, that the presumption is rebutted and the gun was here long prior to the enactment of the statute. [fol. 49] In view of that rebuttal of the presumption, I say there is no question of fact to go to the jury and request that the motion be granted.

The Court: Mr. Sommer, I am going to overrule your motion.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, U. S. D. J. [L. S.]

* * * * * * *

Mr. Sommer summed up for the defendant.
Mr. Langbein summed up on behalf of the government.

Charge of the Court

Mr. Foreman, and ladies and gentlemen of the jury: The Grand Jurors of the United States, for the District of New Jersey, have returned an indictment which charges the defendant, Frank Tot, with violating sub-section 902 F of Title 15 of the United States Code. This indictment, and I hold it in my hand, is only a step in the proceedings. It is not to be considered by you in determining whether or not he is guilty. It is the method by which the matter is brought before you for your consideration. That is the purpose it serves and it is not evidence in any manner of the offense charged.

This statute was passed and became effective on June the 30th, 1938 and it reads that: "It is unlawful for any person who has been convicted of a crime of violence to receive any firearms or ammunition which has been shipped [fol. 50] or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of the chapter."

There are fundamental rules which will guide you in your deliberations. The defendant is presumed to be innocent. The United States Government must establish his guilt to your satisfaction beyond a reasonable doubt. Reasonable doubt has often been defined, and it might be said that it is very seldom understood. It is not a mere possible doubt, it is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding prediction, to a moral certainty, of the truth of the charge. You must be satisfied of the guilt of the defendant beyond a reasonable doubt, and you arrive at your verdict by considering all of the evidence.

And how does the Government come forward and attempt o establish the guilt beyond a reasonable doubt, and how oes the defendant attempt to meet or meet that which has een offered against him? The United States Government, y the evidence, says that subsequent to June the 30th, 938 Frank Tot received Exhibit G-2, the revolver, after t had been shipped or transported in interstate or foreign ommerce, and it says that is so because this revolver was found in a coat in a wardrobe on the second floor of the house in which Frank Tot lived; that he told the representative of the FBI, the Federal Bureau of Investigation, where the gun was and that, by reason of being so told, one of the investigators for the Federal Bureau went to the wardrobe and there found Exhibit G-2.

Frank Tot comes forward and he says: "have had that gun for many years. I had it before I was married and [fol. 51] when I lived on Warwick Street. After I was married I still continued to have it and I kept it where I lived," that "I acquired it by purchasing it from a man who was on the dumps."

The question is raised and squarely raised: Did Frank Tot have that gun before June the 30th, 1938? If you find that he did your deliberation ends, ladies and gentlemen, and you return to this jury room and render a verdict of not guilty. If you find, however, that he acquired the gun subsequent to June the 30th, 1938, then you have to ask yourselves whether or not that gun was received by him after it had been shipped or transported in interstate or foreign commerce; and you have to be satisfied that it was so shipped or transported beyond a reasonable doubt, before you can find the defendant guilty. But if you find beyond a reasonable doubt that it was so shipped or transported, then your verdict is guilty as charged.

Ordinarily there would be no presumption similar to the one in this case. The burden is on the United States, as I stated, to prove its case beyond a reasonable doubt; that burden does not shift. But by such if there is a presumption that this gun having been found in the possession of the defendant, was transported or shipped in interstate or foreign commerce, if you find that he obtained same subsequent to June the 30th, 1938.

Does the testimony which has been offered on behalf of the defendant, if you find that he acquired the gun subsequent to June the 30th, 1938, meet that presumption and

cause you to have a reasonable doubt as to whether or not the gun was transported or shipped in interstate or foreign commerce? You are, as I have said and if I haven't, I now say, the judges of the facts. You determine what are the facts and you determine the facts by considering all of the evidence and what weight and credibility you will give thereto. That is why these witnesses come before you, so [fol. 52] that you may see them on the witness stand and watch the way they answer questions, know by reason of having seen them, their demeanor on the witness stand. And you have, in passing upon the weight and credibility that you will give to testimony, the right to take into consideration the interest that a person may have in your verdict. And if you believe that a witness knowingly and wilfully testified falsely to any material fact in the case, you may give such weight to his or her testimony on other points as you think it is entitled to; or you may disregard it altogether. False in one thing, false in all, is not mandatory, but rather a permissive inference that the jury may or may not draw when convinced that an attempt has been made to mislead them in some material respect.

There has been testimony of conviction, more particularly the conviction on June the 22nd, 1925 for assault and battery and the conviction for breaking and entering on June the 15th, 1932. They have both been put before you to meet the requirements of the statute that this statute applies to a person who has been convicted of a crime of violence. There is also testimony that Mr. Tot was convicted of another crime other than those two which are set forth in the indictment; and there is testimony that Mrs. Tot was convicted of a crime.

Now, gentlemen, with a respect to those convictions, they are before you not for the purpose of showing that Mr. Tot carried a concealed weapon or that Mrs. Tot was convicted of a crime the nature of which she does not remember, but they are before you so that you can consider what weight you will give to their testimony. They are offered to attack their credibility. In other words, will you believe in whole or in part, the story which has been told by a person who has been convicted of crime? You consider those convictions for the purpose of determining weight and credibility to give to their testimony. That is the purpose.

[fol. 53] This statute is drafted in the manner in which it is in order to meet a situation which would confront one

attempting to prove transportation or shipment in interstate or foreign commerce by creating, as I have said, the presumption of transportation or shipment; and you must determine whether or not that presumption plus the other evidence which has been offered on behalf of the Government is sufficient to establish, beyond a reasonable doubt, that the defendant, subsequent to June the 30th, 1938, received Exhibit G-2, the gun, after it had been transported or shipped in interstate or foreign commerce. That is the question, ladies and gentlemen. If you answer it in the negative, if you say that you are not satisfied beyond a reasonable doubt, or that he had the gun prior to June the 30th, 1938, then your verdict is not guilty. If you are satisfied, then your verdict is guilty as charged.

Are there any exceptions? You may come forward just a minute, gentlemen. Before you take your exceptions, let me look at these requests: The defendant has requested me to charge certain things. Number one has been charged. Number two has been charged. Number three will not be charged. Number four——

Mr. Sommer: Was charged.

The Court: Has been charged. Number five has been charged. Number six has been charged. Number seven has been charged. Number eight has been charged in effect. Number nine has been charged in effect. Number ten will not be charged. Number eleven has been charged. Number twelve will not be charged. Number thirteen is charged in the words of the request as follows: That "it is not a crime in the State of New Jersey for a person to possess a revolver in his home."

I so charge you.

Mr. Sommer: And I wish at this time, if your Honor please, to take exception to your Honor's refusal to charge number 3, number 10 and number 12 of the requests.

[fol. 54] Defendant's counsel prays an exception to the refusal of the Court to charge requests number 3, number 10 and number 12.

(Exception allowed and sealed.)

Forman, U. S. D. J. [L. S.]

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The Court: Gentlemen, will you please check the exhibits and be satisfied that they are in order. There is one exhibit, it is D-1 which is for the benefit of the Court and will be left with the Clerk of the Court. The officer will come forward and be sworn. You may retire, Mr. Foreman, and ladies and gentlemen of the jury.

(The jury retired.)

* * * * * * *

(At 9 P. M. the jury returned to the jury box and returned a verdict of guilty as charged.)

REQUESTS TO CHARGE

1. That a defendant is at all times presumed by the law to be innocent. To convict the government must rebut the presumption of innocence and convince the jury beyond a reasonable doubt that he is guilty.

2. That the presumption of innocence continues in favor of a defendant throughout the entire trial, step by step, and remains with him unless and until the jury have reached a verdict of conviction, on consideration of all the evidence, beyond a reasonable doubt.

[fol. 55] 3. That the jury must infer innocence if possible.

4. That a defendant is legally presumed to be innocent unless and until his guilt is proved beyond a reasonable doubt, after consideration by the jury of all the evidence. The benefit of the reasonable doubt always goes to a defendant and is always applied in his favor on every fact necessary to prove his guilt.

5. That a defendant is entitled to the benefit of the reasonable doubt, on the evidence presented or lack of evidence.

6. That "reasonable doubt" is a term often used, probably well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on oral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, often the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction

to a moral certainty of the truth of the charge. The evidence must establish the truth of the fact to a reasonable and moral certainty a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

7. That the mere fact that an indictment has been returned against a defendant creates no presumption against him. It is a mere step or pleading in the cause. During your deliberations, therefore, you are not to consider the indictment as evidence against any defendant, or permit it standing by itself to in any manner weight against him.

8. That the law does not require of a defendant accused of crime, to prove himself innocent, but the law requires the prosecution to prove the defendant guilty in the manner [fol. 56] and form as charged in the indictment, beyond a reasonable doubt, and unless it has done so, the jury, under their oaths, must acquit.

9. That the statute under which the indictment against this defendant is drawn provides that the possession of a firearm by a person who has been convicted of a crime of violence is presumptive evidence that such firearm was shipped in Interstate Commerce.

10. That such a presumption is never evidence and if you find that this presumption has been repelled by the evidence you must acquit.

11. That unless you can find from the evidence that the firearm was shipped in Interstate Commerce after June 30th, 1938 you must acquit.

12. That unless you can find from the evidence that the revolver which is Exhibit "G-2" was a part of a combination of revolver and silencer or muffler you must acquit.

13. That it is not a crime in the State of New Jersey for a person to possess a revolver in his home.

[fol. 57] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Memorandum. On Petition

UNITED STATES OF AMERICA

vs.

FRANK TOT

JOHN J. QUINN, Esq., U. S. Attorney (by WILLIAM A. SMITH, Esq.), for the Government.

GEORGE R. SOMMER, Esq., Attorney for Defendant.

DECISION—Filed August 14, 1939

FORMAN, *District Judge:*

On June 30, 1938, Congress enacted the Federal Fire Arms Act, which, became, by its terms, effective thirty days after its enactment. Among its provisions is the following:

"(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter." 15 U. S. C. A. 902.

On the morning of September 22, 1938, a Special Agent of the Federal Bureau of Investigation served upon the [fol. 58] defendant, at his apartment at 182 East Kinney Street, Newark, New Jersey, a warrant for his arrest, issued upon a complaint made on September 21, 1938, charging the defendant with stealing from Interstate Commerce. At the time of the arrest, the Agent inquired of the defendant whether he had a gun. Defendant admitted possession of a weapon, and told the Agent it was in the pocket of his coat, hanging near by. The Agent removed a revolver from the coat pocket. Other accompanying Agents contemporaneously searched the apartment. Subsequently, the defendant was taken from the premises and arraigned before a United States Commissioner. There is no dispute as to these facts.

The defendant was indicted on November 15, 1938 in the following language:

"That on or about the 22nd day of September in the year 1938 at the City of Newark in the County of Essex and State and District of New Jersey and within the jurisdiction of this Court, one Frank Tot, otherwise Frank Tott, whose true and correct name, other than as herein stated, is to the Grand Jurors unknown, he, having been theretofore duly convicted on the 22nd day of June in the year 1935 in the Special Sessions Court of the County of Essex, in the State of New Jersey, before Honorable Edwin C. Caffrey, Judge of said Court, of a crime of violence, to wit, assault and battery with intent to beat, wound and ill-treat one James Johnson, did knowlingly, unlawfully and feloniously conceal and store a certain firearm, to wit, a .32 calibre Colt Automatic pistol, which said pistol had been theretofore shipped in interstate commerce; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

[fol. 59] A petition was filed by defendant, alleging that the "search and seizure was illegal, unreasonable, unjust, made without probable cause, without a search warrant, and not as an incident to a lawful arrest, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America."

He prayed that an order be made directing the Director of the Federal Bureau of Investigation and the United States Attorney for the District of New Jersey, and all other Federal Authorities, to return the property (the revolver is the only property shown to have been seized) taken by virtue of said search, to the defendant, and, generally, to have the information and evidence acquired by the search and seizure suppressed.

Upon the hearing on this petition, the defendant objected, first, that the seizure was unlawful, unreasonable and in violation of the defendant's rights under the Fourth and Fifth Amendments to the Constitution, and secondly, that the Federal Fire Arms Act, in so far as it relates to the indictment against the defendant, is unconstitutional.

As to the Alleged Illegal Search and Seizure

It is conceded that the arrest of the defendant was lawful in that the officers were armed with a warrant for the

arrest of the defendant. However, the defendant complains that, contemporaneously with the arrest, the officers ransacked the living quarters of the defendant in an exploratory search, and cites Go-Bart v. United States, 282 U. S. 344; Lefkowitz v. United States, 285 U. S. 452, and other decisions of the United States Supreme Court, holding such searches, even though incident to the service of an arrest warrant, to be a violation of Constitutional rights. The defendant fails to note that an important exception to searches and seizures, otherwise objectionable, is made in [fol. 60] the matter of relieving a defendant, who is being arrested, of a weapon or other thing which may be used to effect an escape from custody.

In Agnello v. United States, 269 U. S. 20, 30, the Court said:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See Carroll v. United States, 267 U. S. 132, 158; Weeks v. United States, 232 U. S. 383, 392."

This rule can be no less the law when the arrest is by virtue of a warrant, although the defendant is not actually engaged in the commission of a crime, as the facts in the case at bar disclose.

Any other action by the officer in this case might well have left the defendant in position to reach for his coat, possess himself of his revolver and effect his escape, with violent results to the agents, himself, or all. In justice to him, let it be noted that he frankly admitted possession of the revolver, and even offered to get it for the agent. But, if the agents' actions in this case were regarded as anything but lawful, provocation to escape and the hazard to the safety of the arresting officer would not be minimized, and, indeed, a premium would be placed upon such actions. The search for, and the seizure of, the revolver in this case, was reasonable and legal, and violated no Constitutional right of the defendant.

[fol. 61] As to the Alleged Unconstitutionality of the Federal Fire Arms Law as It Relates to the Indictment of This Defendant

It is contended that Section (f) of the Federal Fire Arms Law, 15 U. S. C. A. 902, conflicts with the guarantee provided in the Second Amendment of the Constitution, providing that:

"A well regulated Militia, being necessary to the security of a free State, the right of a people to keep and bear arms shall not be infringed."

This is the only reason set forth by the defendant for attacking the Act in question. In effect, the defendant contends that Congress is restrained by this Amendment from infringing upon the right of the people to bear arms. This is not the design of Congress in this legislation. On the contrary, it is apparent that Congress seeks here to control the interstate traffic in fire arms upon the part of criminals, and, in this respect, it is acting entirely within the scope of its powers.

Similar provisions for the control in Interstate Commerce, so as to minimize crime, have been held to be constitutional. Notable examples of this occurred in the instances of the so-called White Slave Act, 18 U. S. C. A. 397, *et seq.* and the National Motor Vehicle Theft Act, 18 U. S. C. A. 408, *et seq.*, the constitutionality of both of which has been sustained.

In Hoke v. United States, 227 U. S. 308, 322-323, the White Slave Act was upheld, and the Court said:

"Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those con- [fol. 62] ferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

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"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. Gloucester

Ferry Co. v. Pennsylvania, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856."

In Brooks v. United States, 267 U. S. 432, 437, the Court sustained the Constitutionality of the National Motor Vehicle Theft Act, and said:

"The objection to the Act can not be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

The effort, under the Federal Fire Arms Act, is a similar exercise by the United States of its powers over interstate commerce with incidental exercise of police power for the benefit of the public at large.

[fol. 63] The defendant specifically contends that this Act is inconsistent with his rights under the Second Amendment to the Constitution. With this contention I cannot agree. This legislation in no wise affects either the rights of the States to maintain their Militia or the rights of the people to keep and bear arms in a lawful manner within the States. This objection was considered in the case of United States v. Adams, 11 F. Supp. 216, 218 as follows:

"The second amendment to the Constitution, providing, 'the right of the people to keep and bear arms, shall not be infringed,' has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights. This is well presented in State v. Workman, 35 W. Va. 367, 372, 14 S. E. 9, 14 L. R. A. 606, and is sustained by the following: Hill v. State, 53 Ga. 472; Civil Rights Case, 109 U. S. 3, 31 3 S. Ct. 18, 27 L. Ed. 835; Robertson v. Baldwin, 165 U. S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715; McKenna, The Right to Keep and Bear Arms."

Section (f) does not violate the Second Amendment to the Constitution.

The prayer of the defendant's petition will be denied.

* * * * * * *

[fol. 64] In District Court of the United States, District of New Jersey

197-c On Demurrer to the Indictment. Opinion

United States of America

vs.

Frank Tot

Appearances:

Attorneys for the Government,
William F. Smith, Esquire, United States Attorney, Trenton, N. J.
Irwin L. Langbein, Esquire, Special Asst. to the Attorney General, Department of Justice, Washington, D. C.

Attorney for the Defendant,
George R. Sommer, Esquire, 17 Academy Street, Newark, N. J.

Decision

This case is before the Court for determination of a demurrer to an indictment charging the defendant with violation of 15 U. S. C. A. 901 (f).

The indictment charges that the defendant had been convicted of certain crimes of violence and thereafter knowingly, unlawfully and feloniously received a firearm, to wit, a thirty-two calibre colt automatic pistol which had been shipped and transported in interstate commerce.

[fol. 65] The defendant contends that the demurrer should be sustained on two grounds: first, that the statute here involved, the Federal Firearms Act, 15 U. S. C. A. 901, is unconstitutional in that it violates the second amendment to the Constitution; and second, that the pistol involved is not a firearm within the definition of the statute.

On November 15, 1938, this defendant was indicted in the District Court for the District of New Jersey for a violation of the Federal Firearms Act. The defendant filed a petition requesting the suppression of certain evidence and the return of the seized pistol which is here involved, contending that the seizure was in violation of the fourth and fifth amendments to the Constitution and that the Federal Firearms Act is unconstitutional. In disposing of the petition in a well reasoned opinion, Judge Forman ruled that the Federal Firearms Act did not violate the second amend-

ment to the Constitution and denied the prayer of the petition. United States *vs.* Tot, 28 F. Supp. 900. Thereafter, the United States obtained an indictment superseding the indictment which was before Judge Forman. This superseding indictment is the one here under consideration. Under these circumstances, I shall not consider the constitutional question, but shall follow the ruling by Judge Forman wherein he held the Act to be constitutional. See Brussebach *vs.* Cago Corp., 24 F. Supp. 524; American Scantic Lines *vs.* U. S., 27 F. Supp. 271.

The Act, 15 U. S. C. A. 901 (3), provides that "The term 'Firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon."

The defendant contends that the firearm defined by the Act is a weapon and a muffler or any part or parts of that combination; that the word "and" is used in a conjunctive sense and not in a disjunctive sense; and that the weapon [fol. 66] here involved is of a type which is not a firearm within the definition above quoted.

At the argument, the defendant attempted to show that there has never been a silencer or muffler made which will fit a pistol of the type here involved and counsel for both sides agreed to this fact. The basis of this agreement was alleged in defendant's brief to be the statement made in a letter addressed to counsel for the defendant from the Colt's Patent Fire Arms Manufacturing Company that "• • • to the best of our knowledge and belief there never has *meen* a muffler or silencer made to fit one of our .32/c Automatic Pistols."

The indictment, however, charges that the defendant received a "firearm" in violation of the Federal Firearms Act. While the question of whether or not the particular weapon named therein is a firearm may ultimately be a question of law, in the first instance it is a question of fact which cannot be raised by demurrer. It is obvious that this Court cannot take judicial knowledge of the technical operation of firearms which permits some of them to be equipped with silencers or mufflers and prevents others from being so equipped.

The defendant does not contend that the indictment fails to allege sufficient facts to constitute a crime under the provisions of the Federal Firearms Act and it is clear

that the indictment does charge such a crime. The defendant does, however, attempt to attack the indictment by the addition of a fact which is not alleged. Such a demurrer, commonly called a "speaking" demurrer is improper and must be overruled.

Now, January 3, 1941, it is ordered that the demurrer to the indictment be and it is hereby overruled.

Albert L. Watson, United States District Judge.

[fol. 67] In United States District Court, District of New Jersey

Memorandum. No. 197-c

United States of America

vs.

Frank Tot

Appearances:

Charles M. Phillips, Esq., United States Attorney, By Irwin L. Langbein, Esq., Special Assistant to the Attorney General, for the United States.

George R. Sommer, Esq., Attorney for Defendant.

Decision—Filed December 6, 1941

Walker, District Judge:

The above entitled cause arises out of the Federal Firearms Act of 1938.[1] An original indictment[2] was returned on November 15, 1938. A petition to suppress evidence on the grounds of unconstitutionality of the statute and illegality of the search was filed by the defendant on December 1, 1938, and was denied on August 14,

[fol. 68] 1939.[3]

The original indictment was nolle prossed on January 13, 1941.

The present (superseding) indictment was returned on July 13, 1940, correcting errors of transcription in the verbiage of the original indictment. It alleges in substance that the defendant on a named date did unlawfully receive

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[1] Act of June 30, 1938, Ch. 850; 52 Stat. 1250-1252, Title

[2] No. 8857-b.

a "certain firearms, to wit, a 32 caliber Colt Automatic pistol", theretofore shipped in interstate commerce, the defendant theretofore having been convicted of a crime of violence. The statute prohibits any such person from receiving a "firearm" so shipped and provides that possession of a "firearm" by any such person shall be presumptive evidence of unlawful receipt after such shipment.[4]

A demurrer, raising the question of statutory construction was denied on January 3, 1941, on procedural grounds.[5]

Trial was had before the court and jury on January 22, 1941, and a verdict of guilty returned.

Motion "A".

During the trial the defendant contended the "32 caliber Colt Automatic pistol" recited in the indictment and admitted in evidence is not a "firearm" within the statute since the statutory definition of "firearm" restricts the term to silenced or muffled guns.

Decision was reserved pending ballistic expert testimony, which was received on January 27, 1941, and a 32 caliber Colt Automatic with silencer attached was tested on February 13, 1941.

Although the testimony received on January 27, 1941, teaches us and the test held on February 13, 1941, demon- [fol. 69] strates that a silencer can be attached to a 32 caliber Colt Automatic and a 32 Colt Automatic can be and was fired repeatedly with a silencer attached, the court deems it advisable to pass on the question whether or not the statute is restricted to a "firearm" designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer.

The defendant's contentions are: First, the statutory reference to a silencing device • • • "a firearm muffler or firearm silencer" • • • is not set off by punctuation from the preceding description of a gun • • • "any weapon • • • designed to expel a projectile • • • by the action of an explosive". Second, the intervening particle is the conjunctive "and" rather than the disjunctive "or".

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[3] United States *vs.* Tot (D. C. N. J.), 28 Fed. Supp. 900.

[4] Title 15 U. S. C. A. 902(f).

[5] United States *v.* Tot (D. C. N. J.), 36 Fed. Supp. 273.

Punctuation is one of the minor guides to construction. It is not control-ing and it will always give way in favor of the legislative intent and the sense of the words used.[6] The conjunctives "and" and "or" normally retain ordinary meanings when used in a statute, but there is no rule of construction which demands that they do so throughout perversion of sense or intent.[7]

The rule against statutory interpretation creative of "constructive offenses", emphasized by counsel for the defendant, does not operate to preclude inquiry into the sense and intent of criminal statutes but merely defeats ascertained sense or intent in "instances which are not embraced in the language employed by the statute or implied from a fair interpretation of its context."[8] Criminal statutes like [fol. 70] The Supreme Court answered the argument that the meaning of the statute in question is too plain and unambiguous to allow resort to any extraneous aids to construction when it said "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. (Case cited.) The meaning to be ascribed to an Act of Congress can only be

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[6] For examples of Indictments sustained through disregard of punctuation of the Federal statute under which they were drawn see: United States *v.* Lacher, 134 U. S. 624, 628-629, 10 S. Ct. 625; United States *v.* Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42.

[7] United States *v.* Wight, 38 Fed. Rep. 106 (D. C. E. D. Mich.), Indictment sustained by reading "or" for "and". Construction followed by the Supreme Court in Wight *v.* Nicholson, 134 U. S. 136, 10 S. Ct. 487.

[8] Fasulo *v.* United States, 272 U. S. 620, 47 S. Ct. 200.

others "are not to be strained either way."[9]

[9] United States *v.* Bowman, 260 U. S. 94, 43 Ct. 39.

derived from a considered weighing of every relevant aid to construction." [10]

The instant statute was Bill S. 3 in both the 74th and 75th Congresses. It is notable that in all the debates on the statute, while it was in process of enactment, its application to nonsilenced guns was not questioned. On the contrary, there are comments both approving and disproving on the fact that the statute applies to a "gun of any type", and that it contains "the broadest definition that we could make",[11] that it includes "the ordinary duck-shooting gun, the gun with which the farmer's boy shoots the rabbit, the squirrel gun, the target gun".[12] The air gun and possibly the tear gas gun were the only ones intended to be excluded [13] presumably because air is not an "explosive" and tear gas is not a "projectile".

[fol. 71] The earlier National Firearm Act 1934 [14] roughly in pari materia was under discussion during the enactment process of the 1938 Act.[15] The earlier statute brought the silencer within its sharply restricted definition of "firearms" not as an essential of the weapon but as an independent sort of weapon. This is the construction which the government contends is proper for the 1938 Act. Indeed, when you compare the successive forms of the definition in S. 3 with those of the 1934 Act, you see a not too artful simplification of punctuation and verbiage.[16]

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[10] United States *v.* Dickerson, 310 U. S. 554, 60 S. Ct. 1034. See also: United States, *et al. v.* American Trucking Ass'ns. Inc. *et al.*, 310 U. S. 534, 60 S. Ct. 1059.

[11] House Subcommittee Hearings, June 22, 1937.

[12] Senate Committee Hearings April 16, 1935, page 10.

[13] Senate Committee Hearings April 16, 1935, pages 43, 56 and 57.

[14] Act of June 26, 1934, 48 Stat. 1240; Definition Section as subsequently amended now Internal Revenue Code Section 2733.

[15] House Subcommittee Hearings, June 22, 1937, page 12; Senate Committee Hearings, April 16, 1935, page 25.

[16] "The term 'firearm' means a shotgun or rifle having a barrel of less than 18 inches in length, or any other weapon except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, *and includes a muffler or*

The juxtaposition of the successive drafts of the 1938 Act, as more particularly set forth in Footnote No. 16, demonstrates the insignificance of the punctuation and participle upon which the defendant relies, by showing the casual and unpurposive manner in which they slipped into the statute. The first draft of S. 3, set off the weapon clause from the silencer clause by a semicolon, and like the 1934 [fol. 72] statute contained no "part or parts" clause. The elimination of the semicolon punctuation in the second draft could cause little confusion, for there were still only two ideas in the definition, the gun clause and the silencer clause. The addition of the "any part or parts" clause in the final draft when the construction of the definition had already been determined and its intent made clear in the Committee Reports for the first time gave importance to the comma and "or" by which this new clause "or any part or parts of such weapon" was set off, but the legislative intent is clear and the fair interpretation of the context of the statute was enacted, embraces the construction urged by the government.

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silencer for any firearm whether or not such firearm is included within the foregoing definition." National Firearms Act of 1934, 48 Stat. 1240.

"The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive; *and a firearm muffler or firearm silencer*". 79 Congressional Record 11973-11974: Senate, July 29, 1935. (S. 3).

"The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of explosive *and a firearm muffler and firearm silencer*". 81 Congressional Record 1527; 23 id. 9658-9659. (Senate Feb. 24, 1937, engrossment of S. 3, and identical form sent to House.)

"The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive *and a firearm muffler or silencer, or any part or parts of such weapon.*" 83 Congressional Record 9547, 9658-9. (House amendment of S. 3, agreed to by Senate, June 16, 1938; final form of the statute, except for repetition of "firearm" before "muffler". (Italics ours.)

The Treasury Department is given important functions by the statute in administering the licensing provisions [17] under which manufacturers pay $25.00 per year and dealers $1.00 per year to engage in interstate traffic in "firearms". The licensing provisions turn on the same definition of "firearms" as the penal provision involved in the instant case.

The administration of the licensing provisions has been delegated to the Bureau of Internal Revenue.[18] The Bureau has issued regulations under the Act rearranging and numbering the clauses to make explicit the essentially disjunctivet character of the mention of the gun and silencer in the Act.[19] Congress has had an opportunity to disapprove this administrative construction. It has not done so although it has subjected to subsequent amendment another [fol. 73] definition in the very same section of the statute.[20] This failure to amend is "at least persuasive of a legislative recognition and approval of the statute as construed".[21]

The contentions urged by the defendant are rejected, and we hold the 32 caliber Colt Automatic pistol in question is a firearm within the statute.

Motion "B"

The defendant alleges the evidence was insufficient to justify the court submitting the case to the jury and he moves to set aside the verdict of "guilty" returned by said jury.

The statute under which the defendant was tried and found guilty provides:

"It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any fire-

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[17] Title 15 U. S. C. A. 903.

[18] T. D. 4934, July 25, 1938.

[19] Section 315. 1. * * * (b) the term "firearm" means (1) any weapon by whatever name known, which is designed to expel a projectile, or projectiles by action of an explosive (2) any part or parts of such weapon, and (3) a firearm muffler or firearm silencer. (T. D. 4898, May 3, 1939, 5.)

[20] Ammunition Act of August 6, 1939, Ch. 500, 53 Stat. 1222.

[21] McCaughn, Collector *v.* Hershey Chocolate Co., 283 U. S. 488, 51 S. Ct. 510.

arm • • • which has been shipped • • • in interstate or foreign commerce, and the possession of a firearm • • • by any such person shall be presumptive evidence that such firearm • • • was • • • received • • • by such person in violation of this chapter." [22]

The government proved that on September 22, 1938, the defendant possessed the gun identified in the Indictment,[23] and that prior thereto he had been convicted of two crimes of violence.[24] It then rested.

[fol. 74] The defense consisted of testimony by the defendant one year before his marriage [25] he got the gun from an "unfortunate" on the city dumps. The testimony of his sister that prior to her marriage [26] she had seen the revolver in the wardrobe at home and the testimony of his wife [27] that she had seen the revolver in the wardrobe.

On rebuttal the government offered testimony that the gun had been made in Hartford, Connecticut and shipped on September 23, 1919 to Chicago, Illinois. The rebuttal testimony does not contradict the defense of intrastate acquisition and the government relies upon the statutory presumption in the absence of proof that the defendant unlawfully received a firearm shipped in interstate commerce. The presumption is not conclusive and irrebuttable.[28] It is rebuttable.

The presumption in the statute and upon which the government relies shifted the burden of going forward [29] but

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[22] Title 15 U. S. C. A. 902(f), Federal Firearms Act, effective date July 30, 1938, Title 15 U. S. C. A. 906.

[23] It was found in the pocket of a coat hanging in a wardrobe in the apartment where he was arrested after he admitted he had a gun in the pocket of a coat in the wardrobe.

[24] A burglary and an assault.

[25] 1934.

[26] Married about 1935.

[27] Who admitted that she had been convicted of crime.

[28] See: Mobile, Jackson & Kansas City Railroad Company *vs.* J. A. Tunipseed, Admr., 219 U. S. 35, 31 S. Ct. 136.

[29] Wigmore, Vol. IX, page 288, No. 2491.

not the burden of persuasion.[30] It placed upon the defendant the task of producing credible evidence. Even uncontradicted defense testimony must go to the jury for evaluation unless the trial court does not apprehend directly or intuitively doubt of its credibility. This court envisaged doubt of the credibility of the defense. Specifically in the record we have the following: Three witnesses were offered for the defense, two of them had been convicted of crime, and one of said two, namely, the defendant, gave the only explanation as to how the gun had been acquired. His [fol. 75] story that he received it from an "unfortunate" on the city dumps would test the credulity of the credulous.

Evidence which a judge finds—a jury might disbelieve, does not destroy the presumption even though the presumption does not shift the burden of persuasion.[31] In the face of the presumption and facts and circumstances tending to cast suspicion upon the testimony and the witnesses, the credibility and relative value of the evidence offered by the defendant was for the jury.[32]

We turn to the question whether there was adequate evidence to go to the jury on receipt of the gun by the defendant after July 30, 1938, the effective date of the statute.

Does possession subsequent to the effective date of the statute presume a receipt subsequent to July 30, 1938?

The defendant by his testimony and the testimony of his

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[30] See: Yee Hem vs. United States, 268 U. S. 178, 45 S. Ct. 470. The Statutory Presumption, 5 Tulane Law Review 17; United States v. Platt, *et al.*, (D. C. S. D. Texas), 31 Fed. Supp. 788.

[31] Morgan; Some Observations Concerning Presumptions, 44 Harvard Law Review 906. See also: Chaika v. Vandenberg, 252 N. Y. 101.

[32] Hawes v. Georgia, 258 U. S. 1, 42 S. Ct. 204; George A. Luria v. United States, 231 U. S. 9, 19, 34 S. Ct. 10; Stobble vs. United States (7th Cir.) 91 Fed. 2nd 69; Henry Woo vs. United States (4th Cir.) 73 Fed. 2nd 897, Cert. denied, 294 U. S. 714, 55 S. Ct. 512; Gowling v. United States (6th Cir.), 64 Fed. 2nd 796; Boyd v. United States (9th Cir.), 30 Fed. 2nd 900; United States v. Mule (2nd Cir.), 45 Fed. 2nd 132. See also United States v. Moe Liss, (2nd Cir.), 105 Fed. 2nd 144. Cf. Ezzard v. United States (8th Cir.), 7 Fed. 2nd 808.

witnesses tried to establish that he had the gun prior to July 30, 1938.

The statute was intended to apply to existing guns.[33] When the draftsmen recognized the difficult task of proving the manner of acquisition, they undoubtedly recognized that it would be just as difficult to prove when a defendant received a gun [34] as how he received it. Therefore, they said "possession of a firearm • • • by any person shall be presumptive evidence that such firearm • • • was • • • received by such person in violation of this Chapter." The word "Chapter" is a reflective reference to the [fol. 76] statute as a whole. It refers to the Section[35] fixing the effective date just as it refers to the other Sections and it extends the presumption beyond evidence of activity in interstate or foreign commerce and includes when as well as how.

A presumption similar to the one in the Firearms Act is found in the purchase section of the Harrison Narcotic Act • • • that possession of drugs without stamps "shall be prima facie evidence of a violation of this section" • • •. The presumption refers not only to the substantive crime of purchase but also to the venue of the purchase over the contention that the venue must be independently proved.[36]

The defendant in the case at bar had the burden of coming forward with credible evidence showing possession of the gun prior to July 30, 1938. or lawful possession subsequent to July 30, 1938.

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[33] Senate Report No. 82, 75th Cong., 1st Session; Senate Report No. 987, 74th Cong., 1st Session.

[34] The question does not arise as to guns made or shipped by the manufacturer or dealer subsequent to July, 1938.

[35] Title 15 U. S. C. A. 906.

[36] In re Casey vs. United States (9th Cir.), 20 Fed. 2nd 752, Aff'd., 276 U. S. 413, 48 S. Ct. 373; Killian vs. United States, 29 Fed. 2nd 455; Acuna vs. United States, (5th Cir.), 74 Fed. 2nd 359; Mullaney, et al. vs. United States (9th Cir.), 82 Fed. 2nd 638; Frank White vs. United States (9th Cir.), 16 Fed. 2nd 870, Cert. denied, 274 U. S. 745, 47 S. Ct. 660.

Rosenberg, et al. vs. United States (9th Cir.), 13 Fed. 2nd 369.

tion to set aside the verdict of guilty is denied.
endant is to present himself to this court on Mon-
mber 15, 1941, at ten o'clock in the forenoon for

N United States Circuit Court of Appeals, Third Circuit

Appendix to Appellee's Brief

In United States District Court

Testimony

(Caption)

ript of shorthand notes of testimony taken in the
tled matter on Monday, January 27, 1941, at the
ates District Court, Post Office Building, Newark,
ore his Honor, Thomas Glynn Walker, Judge of
t.

pearances:

. Langmuir, Esq., special assistant to the United
orney General, for the Government.
R. Sommer, Esq., for the defendant.

agmuir: If the Court please, this is the hearing
served motion in the case of the United States
t. The Government has just one witness here,
hman, of the F. B. I. May I put him on imme-

ri: You may. Proceed.

Thomas F. Baughman, sworn.

ect examination.

By Mr. Langmuir:

re do you live, Mr. Baughman?
rlington County, Virginia, just across the river
hington.
? is your occupation?
a special agent for the Federal Bureau of Investi-

Q. Do you have any specialized work at the Bureau?

A. I am assigned to the technical laboratory as a firearms expert.

Q. What is your title?

A. Consulting specialist in firearms.

Q. Have you devoted any study to firearms?

A. Yes, sir. I made a study of firearms for a great many years.

Q. Will you give us a very brief résumé of your education and experience in that field?

A. I have studied firearms, construction of firearms and ammunition construction and manufacture in arms plants, munition plants. I have studied firearms and firearms identification under qualified experts. I have lectured in our own school.

The Court: Meaning the F. B. I.?

The Witness: F. B. I. schools, and in police schools throughout the country.

[fol. 79] Q. For roughly how many years have you been working in that field?

A. I have been assigned to the technical laboratories for about six or seven years.

Mr. Langmuir: Do you wish to cross-examine on his qualifications?

Mr. Sommer: No.

Q. Mr. Baughman, will you please state for us in general what a firearm silencer is?

A. A silencer is a device attached to the muzzle of the firearm to cause the gas, the propelling gases, to be released more slowly than they would be merely by coming out of the muzzle without having any attachment thereto. It is in the nature of a muffler on an automobile. It is a device to trap and release the gases slowly.

Q. What, if anything, is the distinction between the terms of "firearm muffler" and "firearm silencer"?

A. I believe that the terms would be interchangeable.

Q. To what point of a gun is a firearms muffler firearms silencer attached?

A. To the muzzle, at the muzzle end. It is possible to attach the silencer to the slide or to the barrel, either one, of an auto-loading type of gun.

Mr. Langmuir: Mr. Reilly, may I have the gun exhibited, in the Tot case?

Q. Does the silencer have any effect upon the expulsion of a bullet from a gun?

A. No, sir, not if properly attached. The bullet should be expelled in the same fashion, and with no reduction in [fol. 80] velocity, as it would be expelled were the silencer not present.

Q. Do you know whether silencers are constructed for double barreled shot guns?

. . . . . .

(Objection, colloquy, overruling exception.)

. . . . . .

A. I have never heard of a silencer for a double barreled shotgun.

Q. In your opinion is it feasible or possible to construct a silencer which would operate on both barrels of a double barreled shotgun?

A. No, sir, I don't believe it feasible.

Q. Would you state the grounds for that opinion.

A. The silencer is a device having a series of discs in it, with holes through the center of those discs. The bullet or projectile, in passing out of the weapon and through the silencer, passes through the holes in those discs. In attaching the silencer to a double barreled shotgun you would necessarily interfere with and obstruct the second barrel. If the silencer were attached to one barrel of the weapon, it would necessarily obstruct the other barrel, or you would have to have a double silencer with a sufficiently large hole for the two shot charges to pass through,—that is, the shot charges from each individual and distinct barrel. If the holes were insufficiently enlarged for the charges from both barrels to go through, the effect would be lost.

Q. What is the relative exterior size of the gun silencer? [fol. 81] A. The exterior size is quite a bit larger than the barrel, necessarily so, to afford a space for the gas to expand behind the bullet within the silencer.

Q. And in a double barreled shotgun approximately what is the width of the rib or solid portion between the two barrels?

A. The barrels are immediately adjacent to each other, just a double thickness of the barrel mould between them.

Q. And if a silencer were mounted on the end of one of the barrels, would it or would it not project over so as to obstruct the other barrel?

A. It would, yes, sir.

Q. I show you a gun, Government's Exhibit G-2, is it?

The Court: That is it.

Q. (Continuing:) And I ask you whether in your opinion it is possible to mount a silencer on that type of gun.

A. Yes, sir.

Q. Would a silencer mounted on that type of gun in your opinion interfere with the effective operation of the gun?

A. No, sir.

Q. Have you ever seen a silencer mounted on that type of gun?

A. I have mounted one on that type of gun myself.

Q. Do you have that mounted silencer with you?

A. Yes, sir.

Q. Will you produce it, please.

Mr. Langmuir: I should like to state for the record that this comes from the F. B. I.'s arsenal, and I am not at liberty to introduce it. It is just offered here for explanation and for your Honor's information.

[fol. 82] A. For the purpose of illustration, the silencer, the thread was screwed on to the edge of the barrel, which was threaded to the receiver. The bullet in passing through here, as you will note by looking through the light, passes through here; but there are a series of discs which are turned over. Those discs have holes through them, so that the gas expands in the large diameter, and slowly escapes through those holes, and comes into the open air at a much reduced velocity. It is put on after opening this. It is cut a little at the end of the barrel. It is not shortening the barrel. It is threaded at the end.

The Court: May I see Exhibit G-2?

A. (Continuing:) Approximately this much of it, what is threaded. It is a very simple job. It took perhaps forty minutes to fix it.

Q. In a normal mounting of the silencer, Mr. Baughman, what means would be used for attachment let us say in the case of a rifle?

A. A similar system is usually the one followed. The end of the barrel is threaded and the silencer is screwed on. Sometimes there is an additional attachment put on to hold it,—that is, a small pipe-shaped piece of metal. It is threaded into the end of the barrel, the barrel being cut out to receive it, and the silencer screwed on.

Q. In your opinion, is the attachment of the silencer to the type of weapon herein involved, this 32 Colt automatic, a more difficult job than the attachment of a silencer to any of the other forms of weapons or guns to which silencers are ordinarily attached?

A. Yes, sir. It took me about ten to fifteen minutes longer to attach it to the automatic, which is with the slide, than it would have taken to attach it to a weapon without a slide. It [fol. 83] was necessary to cut out a little bit, to bell out the end of the slide, so that there would not be any interference. You see, this is rather tight fitting here, where the slide pulls back. You cut away a little bit of that metal inside. Here you see it enlarged. It is attached to this type of weapon. Just a little bit of the metal is cut out.

Q. One or two questions on the double barreled shotgun. Is the double barreled shotgun a common sporting weapon?

A. Yes. It is one in common use.

Q. Useful for rabbit hunting?

A. Yes, sir.

Q. Duck hunting?

A. Yes. Many of them we use in skeet shooting, and things of that kind.

Q. What is the difference between the ordinary double barreled shotgun, the sporting weapon, and the so-called sawed-off?

A. The saw-off weapon is merely one that has the barrel shortened to an extent greater or perhaps less than in the normal sporting weapon. You speak of a weapon with a barrel less than twenty inches usually as being sawed-off.

Q. For illustration, you have a sawed-off shotgun with you?

A. Yes, sir. The stock of this weapon has been cut off, as well as the barrel. The barrel here, you will note, sir, has been roughly sawed off with a hacksaw or some similar instrument, to shorten it to its present length. What its original length was I don't know. It now measures fifteen to sixteen inches, just less than sixteen inches.

Q. What is the usual length of the sporting shotgun?

A. The sporting shotgun, about twenty-six inches to thirty-two inches, shorter or longer.

[fol. 84] Q. Is this sawed-off shotgun that you are showing us a made up job, like the silencer automatic you just showed us?

A. No, sir. This is an evidence gun that came in in some case. The case file number is on here.

Q. But it is a gun from an actual case rather than from the laboratory?

A. Yes. It was an evidence gun.

Mr. Langmuir: Cross-examine.

Cross-examination.

By Mr. Sommer:

Q. Prior to your fixing this gun up by removing the metal from the slide and then cutting threads into the barrel, had your ever seen a Colt 32 automatic pistol with a silencer annexed to it?

A. No, sir.

Q. Do you know of any silencer that is manufactured for a Colt 32 automatic pistol?

A. No silencers of any kind for any weapons have been manufactured within the last ten years.

Q. Prior to that——

The Court: No silencers for any weapon?

The Witness: No, sir. They have discontinued its manufacture.

Q. Do you know of anyone being manufactured for a 32 Colt automatic pistol?

A. I have never seen one manufactured specifically for [fol. 85] the Colt 32. I have seen silencers of this type which can be attached to the 32, 32 calibre.

Q. Now, in its original condition, as G-2 is, it would be impossible to annex a silencer to it, would it not?

A. Well, to annex a silencer to any weapon you have to prepare the weapon for it,—that is, prepare threads to attach it, either with or attaching it by either brazing or welding. That is a means that you sometimes can use.

Q. In so far as G-2 is concerned, in its present condition, as you see it now, could a silencer be placed on that gun?

A. I don't see how I could answer that, sir, other than by the explanation which I have just given. Any weapon has to be prepared.

Q. I ask you for an answer to my question. Will you look at G-2, which is in front of you? Examine it closely, and tell me whether or not in its condition, as you see it now, it is possible to annex a silencer to it?

A. That is a question to which I cannot say either yes or no, because either one would be misleading.

Q. Well, now, you are an expert on firearms; is that correct?

A. Yes, sir.

Q. Now, will you look at G-2 and tell me whether in its condition as it now is it is possible to put a silencer on it?

. . . . . .

(Objection and colloquy, no ruling.)

. . . . . .

A. Any new weapon or any weapon which is not specifically made for a silencer must be prepared by being [fol. 86] either threaded or having the silencer attached by means of welding or brazing. The pieces of metal are not going to adhere to each other unless they are attached by some mechanical means.

Q. Now, will you answer my question after your explanation? Looking at G-2, in its present condition is it possible to attach a silencer to it?

A. By threading the barrel, yes, sir; not without threading the barrel.

Q. Let me ask you the question once more. In its present condition is it possible to annex a silencer to it?

A. Not without either threading the barrel or welding.

Q. In other words, your answer to my question is that in its present condition it is not possible to annex a silencer to it?

A. Yes, sir. It is possible to annex a silencer to it; but you have to prepare the gun for the silencer, of course.

Q. Well, now, I am going to repeat the question, and I want an answer to my question.

Mr. Langmuir: If the Court please, I object. I press my objection.

Mr. Sommer: I think the witness is fencing with me and trying to evade answering the question.

The Court: No. I can see the distinction, Mr. Sommer. "Is it possible in its present condition?" and the answer is, "Yes, if you add to the present condition by welding, or by threading."

The Witness: Threading.

The Court: Without that it cannot be done.

[fol. 87] Mr. Sommer: That is right, and that is the answer I want the witness to give me.

The Court: The record will show, "Without that it cannot be done."

The Witness: Yes, your Honor. Without threading or welding it cannot be done.

Q. Have you fired any shots from this gun without the silencer on it?

A. No, sir.

Q. Is it possible to fire more than one shot with that gun with a silencer on it?

A. I haven't fired this gun. From personal experience, not firing this gun, I can't say. I have fired many automatic pistols with silencers, and it worked satisfactorily.

Q. 32 Colt automatics?

A. No, sir.

Q. What is the strength of the undercarriage of that gun?

A. That I don't know, sir.

Q. What is the strength of the rollers of that gun?

A. By "undercarriage" I didn't understand what you meant. There are no rollers on that gun.

Q. There are no rollers there?

A. No, sir.

Q. There is an undercarriage?

A. I don't understand what you mean by "undercarriage." This is technically known as the receiver, not carriage.

The Court: What is that?

The Witness: The receiver, the portion that is in your hand when you fire.

[fol. 88] Q. Do you know what the effect on the barrel of that particular revolver would be if it were fired by having performed on it in the manner that you have, and placed that silencer on it?

A. No effect on the barrel.

Q. Sure the barrel wouldn't bend?

A. Yes, sir.

Q. Positive of that?

A. Positive of that, sir.

Q. What would be the effect on the automatic qualities of that pistol with that silencer on it?

A. I believe no effect at all, sir.

Q. Wouldn't it destroy its automatic qualities completely?

A. No, sir. Auto-loading. It is not an automatic. It is called an automatic; but it is strictly an auto-loading.

The Court: An auto-loading?

The Witness: An auto-loading, yes, sir.

Q. What would be the effect on it in so far as loading is concerned?

A. None.

The Court: Just a minute. I don't get the distinction.

The Witness: Being perhaps unduly technical for your Honor, this type of weapon is a self-loading or auto-loading weapon. That is, when the shot is fired the recoil ejects the empty cartridge case, and then as the slide moves forward it carries a fresh cartridge into the barrel of the pistol and leaves the weapon cocked and ready for another [fol. 89] pressure upon the trigger to fire a second shot. Strictly, an automatic weapon is one which is capable of firing more than one shot with one pressure on the trigger.

Q. You don't, then, know what the effect of a silencer annexed to this particular type of automatic pistol would have upon it, would you?

A. Not the 32 automatic. I believe it would have no effect. I have fired other calibre automatic pistols with silencer attached, and had no appreciable effect noticed.

The Court: Was it an increased calibre or decreased?

The Witness: Both 45, super automatics, and 22. It doesn't silence. It reduces the noise from 25 to about 60 per cent, varying on the type of weapon.

The Court: Is this silencer the type that is called a Maxim?

The Witness: Yes. This is a Maxim silencer.

Q. Now, on G-2 you find on the underside of the barrel a bearing, do you not?

A. I am not sure that I understand your question.

Q. On the underside of the barrel there is a bearing?

A. Yes, sir.

Q. What is the purpose of that bell?

A. As a guide for the barrel.

Q. And that guide is there for the purpose of keeping the barrel from turning, is it not?

[fol. 90] A. Yes, sir.

Q. When you annex the silencer you destroy that bearing, do you not?

A. No, sir. I remove a portion of it.

Q. Well, you destroy the bearing, don't you?

A. No, sir.

Q. In other words, you reduce the size of the bearing?

A. Very slightly, yes, sir.

Q. Let us see what you call "slightly". You cut it more than in half, did you not?

A. No, sir. I don't think I took as much as that off. Probably not over a third.

Q. Do you know what effect the reducing of the strength of the bearing would have?

A. I believe it would have no effect, sir.

Q. Do you know whether it would or not?

A. Not having tried this weapon, I don't know. But I believe it wouldn't. That is my opinion.

Mr. Sommer: That is all.

* * * * * * *

[fol. 91] STIPULATION CONCERNING GUN

(Caption)

It is stipulated that:

On February 13, 1941, at the Newark Police pistol range, in the presence of Honorable Thomas Glynn Walker, United States District Judge, and of both counsel, the Government's witness Parsons, a ballistics expert of the Federal Bureau of Investigation, demonstrated a gun of the same make and model as the gun introduced in evidence as Exhibit G-2. The gun demonstrated by Parsons was

the same gun previously exhibited to the Court by the Government's witness Baughman, in the course of Baughman's testimony, viz., a .32 calibre Colt automatic to which had been attached a reamed-out silencer, originally factory-made for a .25 gun but enlarged to permit the passage of a .32 calibre bullet. Parsons fired the gun repeatedly, both with silencer attached and not attached. When fired with silencer attached, there was an appreciable diminution of noise. Parsons also testified in the course of the above demonstration, but his testimony was not stenographically reported. Its substance is that he knew of no factory-made commercial silencer designed for a .32 calibre gun, that he believed it unlikely that there was one, and that if there were made a silencer originally designed for a .32 calibre gun it could be so designed and made as to have a greater silencing effect than the reamed-out .25 calibre silencer. The witness gave no opinion concerning the percentage of efficiency of the demonstrated silencer or the hypothetical .32 calibre silencer.

So stipulated this February 13th, 1941.

(Signatures.)

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[fol. 120] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7961

UNITED STATES OF AMERICA, Appellee,

vs.

FRANK TOT, Appellant

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 7th day of July A. D. 1942, it is ordered that Hon. Guy K. Bard, District Judge, for the Eastern District of Pennsylvania, and Hon. —— ——, District Judge, for the —— District of ——, be, and he is hereby assigned to sit in above case to make a full court.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Assigning Judge Bard for Argument. Received & Filed July 7, 1942. Wm. P. Rowland, Clerk.

[fol. 121] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7961

UNITED STATES OF AMERICA

vs.

FRANK TOT, Appellant

And afterwards, to wit, the 7th day of July, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and Honorable Guy K. Bard, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of October, 1942, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 122] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7961

UNITED STATES OF AMERICA

v.

FRANK TOT, Appellant

On Appeal from the Judgment of the District Court of the United States for the District of New Jersey

OPINION—Filed October 28, 1942

Before Maris and Goodrich, Circuit Judges, and Bard, District Judge

GOODRICH, Circuit Judge.

The defendant, Frank Tot, was convicted and sentenced for violation of the statute known as the Federal Firearms Act by which it is made unlawful for any person who has [fol. 123] been convicted of a crime of violence "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce • • •"[1] That defendant had been previously convicted of a crime of violence, as defined in the Act, is undisputed. He was arrested by federal officers at his home in Newark, N. J. on a warrant charging theft of cigarettes from an interstate shipment. A .32 caliber Colt Automatic pistol, was found in his place of residence at the time of the arrest, which took place on September 22, 1938. In this appeal the appellant raises several questions of difficulty and importance concerning the statute cited. Additional facts necessary for presentation of the legal questions involved will be made in connection with the question to which they are relevant.

Search and Seizure

At various stages of the proceedings after his arrest, appellant made timely motions for the suppression and return of the gun and that any evidence pertaining to it, which

[1] 15 U. S. C. A. (1939) § 902(f).

had been admitted over his objection, be stricken. All of these motions were denied. Their basis was the appellant's contention that the gun had been obtained in violation of his Constitutional guarantee, under the Fourth Amendment, against unreasonable searches and seizures.

Since what the Constitution prohibits is unreasonable search and seizure it is inevitable that the courts are confronted with marginal cases and that sometimes the line between what is held reasonable in one case and unreasonable in another becomes faint. Some searches and seizures incident to a lawful arrest are permitted; others are not.[2] The facts presented here, however, do not show a case close to the line where our result would be indicated only by a careful analysis and differentiation among authorities by which we are bound. We are not here confronted with the prob- [fol. 124] lem of the propriety of the seizure if the officers had found a quantity of cigarettes about the accused's premises and seized them as evidence of his complicity in the crime with which he was charged in the warrant of arrest. Still less are we concerned with the legality of a seizure of some article of contraband like a package of opium or a container of untaxed alcohol. The only article seized here was the gun. Undoubtedly upon Tot's arrest under a valid warrant, as this was, his person could have been searched and the weapon taken from him.[3] The same privilege to search the place where the arrest is made "in order to find and seize things connected with the crime as its fruits • • • , as well as weapons and other things to effect an escape from custody, is not to be doubted."[4]

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[2] Cf. United States v. Lefkowitz, 285 U. S. 452 (1932) and Go-Bart Importing Company v. United States, 282 U. S. 344 (1931) with Marron v. United States, 275 U. S. 192 (1927).

[3] 4 Am. Juris., Arrest, § 68.

[4] Agnello v. United States, 269 U. S. 20, 30 (1925). The Court states that this privilege exists where the arrest is made for a crime committed in the presence of the arresting officers. The latter requirement merely establishes the lawfulness of an arrest without a warrant, as in the Agnello case. When the arrest is made with a warrant, as here, the requirement is unnecessary, for then, the privilege of search and seizure, being incidental to a lawful arrest, is as extensive.

ing of the warrant and the taking of the gun
ers were practically a contemporaneous trans-
e evidence shows that Tot was asked if he had a
it he replied in the affirmative. He stated that it
pocket of his coat which was hanging in a ward-
in his bedroom. Whether this conversation took
kitchen, where the arresting officers entered or
ng bedroom, is disputed. We think it does not
here was also testimony that Tot offered to get
self and that this unusual offer was declined by
one of whom went to the closet, found the coat,
e gun and took possession thereof. It might
that defendant's offer to produce the gun con-
onsent on his part to its taking by the officers.
of this, however, we think it apparent that the
his case is clearly within the rule stated by the
Court as one not to be doubted under which
weapons and other things which may be used to
scape from custody may be seized without a
rant upon a lawful arrest.

l search of the premises was made, however,
y warrant the officers had was the one for the
e accused. If we assume, solely for the purpose
on, however, that the search was wider than
nal limitations permitted, does this invalidate
and the seizure of the weapon which was other-
as an incident to the arrest? The analogy at
ted is the ancient doctrine of trespass ab initio
bsequent misconduct of a party entering under
n by law may render the original entry tortious.
owever, this doctrine does not invalidate the
act for the accomplishment of which the privi-
Nor is it applicable to criminal prosecutions
the United States.[6] Our conclusion is that un-
ts of this case the defendant may not complain
of Constitutional rights in the search and seiz-
gun, and the overruling of his various motions
ons based on this theory were correct.

ement, Torts (1934) § 214, comment f.
v. United States, 273 U. S. 95, 98, 99 (1927).

Meaning of the Statute

Appellant's second contention is that the correct construction of the statute does not include the gun which was in his possession at the time of his arrest. In defining the term "firearm" the Congressional language states that it "means any weapon, • • • which is designed to expel a projectile • • • by the action of an explosive and a firearm muffler or a firearm silencer, or any part or parts of such weapon."[7]

The pistol here in question was not equipped with a silencer nor is there, according to the testimony of the government's expert, a commercially made silencer for this .32 [fol. 126] caliber weapon. It is conceded, however, that a silencer could be made for it and there is evidence of a demonstration of the successful fitting and operation of a made-over .25 silencer on a gun of the same make, model and caliber. The appellant's argument is that the plain words of the statute, in which the conjunctive "and" is used instead of the disjunctive "or" or a combination of the two, limits the application of the statute to guns which are provided with a silencer, or where one may readily be applied. This being the plain meaning, he says, and the statute a penal one, resort should not be had to extrinsic sources like Treasury Regulations or legislative debates and hearings to give it some other meaning.

If the premise of plain meaning were acceptable, there is something to be said for the suggested conclusion. We do not agree with the appellant's argument about the plain meaning. The statute as a whole indicates an ambitious plan for dealing with firearms in interstate commerce. The very sentence upon which appellant relies shows, in the last phrase, the intent of Congress to deal with the parts as well as the whole. The appellant's interpretation of the language requires the word "and" to be read as "combined with". This, it seems to us, is quite a jump from plain meaning. It is a much narrower construction than we believe Congress meant in view of the statute as a whole and the concluding clause of the sentence referred to.

That Congress had no such narrow limitation in mind is clear from the discussion of the statute prior to its passage. Both the proponents and opponents of the Act

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[7] § 901 (3).

thought of its provisions in the broadest terms, applicable to a "gun of any type", "firearms of all kinds", etc.[8] This reference is not made to put in the statute something which is not there. But, it is a matter for consideration in de- [fol. 127] termining what the scope was of the problem the legislature had in mind.[9]

There is an additional point of administrative regulation also. Section 903 of the Act relates to licensing of manufacturers of and dealers in firearms and this is committed to the Treasury. Regulations were issued under which the clauses were rearranged and numbered to make explicit the disjunctive relation of the gun and the silencer.[10] The Congress subsequently amended the definition of ammunition in the very same statute.[11] The opportunity was then present to modify the firearms definition if the Congress

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[8] Hearings before Senate Committee on Commerce on S.3, 74th Cong., 1st Sess. (1935) 10, 13, 15, 44; Hearings before H. R. Subcommittee of the Committee on Interstate and Foreign Commerce on S.3, 75th Cong., 1st Sess. (1937) 4, 5, 18. Sen. Rep. No. 997, 74th Cong., 1st Sess. (1935) 1; Sen. Rep. No. 82, 75th Cong. 1st Sess. (1937) 1.

[9] It is also noteworthy, that the first two drafts of this Section interposed a semi-colon between "explosive" and "and". See next as it appears in Senate Hearings, supra at pp. 1, 2 and in 79 Cong. Rec. 11973, 11974 (1935). The semi-colon was absent in the third draft which was sent without further amendment to the House. See H. R. Hearings, supra, at pp. 1-3. The Senate Report on the third draft states that the only change from prior drafts in the bill appears in a section, other than the one under consideration. See Sen. Rep. No. 82, supra, H. R. Hearings, supra, at p. 13. This legislative history indicates that the omission of the semi-colon in the final draft was unintentional. With that punctuation mark, it is clear that the statute meant guns with or without silencers as is otherwise apparent from the Hearings, supra.

[10] "The term 'firearm' means (1) any weapon, by whatever name known, which is designed to expel a projectile or projectiles by action of an explosive, (2) any part or parts of such weapons, and (3) a firearm muffler or firearm silencer." 26 Code Fed. Regs., 1939 Supp. (1940) § 313.1(b).

[11] August 6, 1939, 15 U. S. C. A. (Supp. 1941) § 901(8).

had considered that the administrative officers had carried it beyond its original meaning. We think this is a case where what the Treasury had evidenced as being its understanding of the meaning of the statute, "Congress impliedly confirmed as being correctly interpretative of the legislative intent."[12] Our conclusion upon this point is that the pistol here in question was within the definition of firearms given in the statute.

[fol. 128] The Second Amendment

The Second Amendment to the Constitution of the United States provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

The appellant's contention is that if the statute under which this prosecution was brought is to be applied to a weapon of the type he had in his possession, then the statute violates the Second Amendment.

It is abundantly clear both from the discussions of this Amendment contemporaneous with its proposal and adoption, and those of learned writers since[13] that this Amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual

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[12] Aluminum Co. of America v. United States, 123 F. (2d) 615, 620 (C. C. A. 3, 1941). The Regulation does not, on the facts here, gain authority from its long standing character. It became effective May 1, 1939. The statutory amendment came in August of the same year. But the subject matter of the statute, and obviously especially the definitional provisions, were before Congress during the dates mentioned.

[13] 1 Elliot's Debates on the Federal Constitution (2d. Ed. 1901) 371, 372 (Luther Martin's letter to the Maryland Legislature); 4 id. 203 (Lenoir, North Carolina Convention); 5 id. 445 (Sherman of Connecticut at the Federal Convention). Emery, The Constitutional Right to Keep and Bear Arms (1915) 28 Harv. L. Rev. 473; Haight, The Right to Keep and Bear Arms (1941) 2 Bill of Rights Rev. 31; McKenna, The Right to Keep and Bear Arms (1928) 12 Marq. L. Rev. 138.

rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.[14] The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry [15] was fresh in the minds of the Colonists. They wanted no repetition of that experience in their newly formed government. The almost uniform course of decision in this country,[16] where provisions similar in language are found in many of the State constitutions, bears out this concept of the Constitutional guarantee. A notable instance is the refusal to extend its application to weapons thought incapable of military use. [fol. 129] The contention of the appellant in this case could, we think, be denied without more under the authority of United States v. Miller, 307 U. S. 174 (1939). This was a prosecution under the National Firearms Act of 1934 and the weapon, the possession of which had occasioned the prosecution of the accused, was a shotgun of less than 18 inch barrel. The Court said that in the absence of evidence tending to show that possession of such a gun at the time has some reasonable relationship to the preservation or efficiency of a well regulated militia "could not be said that the Second Amendment guarantees the right to keep such an instrument. The appellant here having failed to show such a relationship, the same thing may be said as applied to the pistol found in his possession. It is not material on this point that the 1934 statute was bottomed on the taxing power while the statute in question here was based on a regulation of interstate commerce.

But, further, the same result is definitely indicated on a broader ground and on this we should prefer to rest the matter. Weapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since.[17] The decisions under the State constitutions show the upholding

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[14] As to the latter, see The Federalist, Nos XXIV-XXIX and No. XLVI.

[15] See Aymette v. State, 21 Tenn. 154 (1840); also law review articles in f.n. 13.

[16] See Haight, supra and McKenna, supra.

[17] See Emery, supra at pp. 473, 474.

of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain public places and other restrictions, in the nature of police regulations, but which do not go so far as substantially to interfere with the public interest protected by the Constitutional mandates.[18] The Federal statute here involved is one of that general type. One could hardly argue seriously that a limitation upon the privilege of possessing weapons was unconstitutional when applied to a mental patient of the maniac type. The same would be true if the possessor were a child of immature years. In the situation at bar Con- [fol. 130] gress has prohibited the receipt of weapons from interstate transactions by persons who have previously, by due process of law, been shown to be aggressors against society.[19] Such a classification is entirely reasonable and does not infringe upon the preservation of the well regulated militia protected by the Second Amendment.

Refusal of Directed Verdict and Request for Charge

The questions raised by the appellant under this heading may be considered together. The alleged error in refusal to dismiss the indictment or to direct a verdict relates, so far as this point goes, to the matter of the government's proof and the charge which was requested and refused concerns the same matter. The statute which makes it unlawful for any person who has been convicted of a crime of violence to receive a firearm which has been shipped in interstate commerce provides that "the possession of a firearm • • • by any such person shall be presumptive evidence that such firearm • • • was shipped or transported or received • • • by such person in violation of this chapter." § 902(f). The prosecution showed a possession of the weapon already described[20] by the

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[18] See f.n. 16.

[19] The statute is applicable to anyone who has been convicted of a crime of violence which is defined as "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." § 901(6).

[20] The instrument itself was in evidence as a government exhibit.

defendant at a date when the statute was in effect. Proof of prior conviction of a crime of violence was also shown. The prosecution then rested. The defendant introduced testimony by himself, his wife and his sister tending to show continuous possession of the gun from a date several years prior to the passage of the statute. Rebuttal testimony for the prosecution was confined to one witness, employed by the manufacturers of the gun, who showed [fol. 131] its shipment in 1919 from the factory in Connecticut to a business firm in Illinois. The defendant by a timely motion asked for a directed verdict and a dismissal of the indictment on the theory that having offered evidence to show his possession prior to the effective date of the statute the presumption created by the statute disappeared and in the absence of additional evidence against that offered by him, he was entitled to have his motions granted. He backs that up with words from Wigmore to the effect that a presumption is merely to invoke a rule of law compelling the jury to reach a conclusion in the absence of evidence to the contrary, and if such evidence is offered, the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.[21] In addition the appellant cites one State decision which seems squarely to apply the rule as he would have it.[22]

We think the answer to the appellant's point here is completely stated in the words of Professor Bohlen in "The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof":[23] "It is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses." Simply causing words to be uttered is not enough. The two women witnesses offered

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[21] 9 Wigmore on Evidence (3rd Ed. 1940) § 2941.

[22] McIver v. Schwartz, 50 R. I. 68, 145 Atl. 101 (1929), but contra see O'Dea v. Amodea, 118 Conn. 58, 170 Atl. 486 (1934) and see the adverse comment on the McIver case by Morgan in Instructing the Jury Upon Presumptions and Burden of Proof (1933) 47 Harv. L. Rev. 59, 78-81; Some Observations Concerning Presumptions (1931) 44 Harv. L. Rev. 906, 912-913.

[23] (1920) 68 U. of Pa. L. Rev. 307, 315 f.n. 13.

by the defendant distinctly faltered in the certainty of their identification of the weapon made so readily upon direct examination.[24] Defendant stuck to his story, but

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[24] On cross-examination:

Appellant's wife:

Q. You are not an expert on guns?

A. No.

. . . . . .

Q. Are you able to tell us definitely and certainly the way you appeared to tell us on direct examination, Mrs. Tot, that it was this gun that your husband had rather than some gun of the same make and calibre, general appearance or what not?

A. Well, I cannot tell you definitely, but it was one like it.

Q. It was one like it. It might have been some other gun?

A. Well, I don't know guns, one from the other.

Q. I see. All you are able to tell us is that your husband Frank Tot had a gun.

A. Yes, sir.

. . . . . .

Q. And you are unable to tell us even roughly, I take it, how many times all told you saw the gun?

A. No.

Appellant's sister?

A. Oh, I should say not.

Q. Are you a gun expert?

Q. Then I take it you don't know either whether this is really the same gun that you say you saw?

A. Well, it reminded me of a water pistol; that is why I know it.

Q. I take it——

A. I don't mean I know it, but the name on it.

Q. The name Colt?

A. That's right.

Q. You know your brother had a Colt gun, is that it?

A. That's right.

. . . . . .

Q. Then, what you know is that your brother used to have a Colt gun that looked like a water pistol?

[fol. 132] it had some elements which certainly made a basis for doubting its truthfulness even without reference to his previous criminal record. We think the most the defendant was entitled to have was a fair submission of the question to the jury. And this, as will be pointed out presently, was given. The constitutionality of presumptions more difficult to rebut than the one here involved has been sustained by the Supreme Court.[25]

Defendant asked an instruction, which was refused, "That such presumption is never evidence and if you find that this presumption has been repelled by the evidence you must acquit." The presumption referred to is that in the statute already quoted.

[fol. 133] To give the instruction in the language asked for by the defendant would have been confusing to the jury. Statutory language is to the effect that possession of the weapon is presumptive evidence of violation. For the court, after having quoted the statute, to tell the jury

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A. One of those things just like you have in your hand.

* * * * * * *

Q. You would see the gun in the drawer?

A. That's right.

Q. Or to be more precise, you would see a gun in the drawer, right?

A. Of course, a gun.

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[25] Yee Hem v. United States, 268 U. S. 178 (1925) (Jones-Miller Act. "* * * such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury"); Hawes v. State of Georgia, 258 U. S. 1 (1922) State statute which provided that distilling apparatus found upon land shall be prima facie evidence that the person in possession of the premises had knowledge of the existence thereof, held Constitutional, although defendant was not allowed to testify under oath or to have the testimony of his wife; Fong Ye Ting v. United States, 149 U. S. 698 (1893) Chinese found in United States without prescribed evidence as to lawful residence to be deemed to be unlawfully in United States unless each establishes by one credible white witness facts to the contrary.

that such presumption is not evidence would certainly have not tended to clarity in their minds. But the learned judge did much more than refuse an instruction which would have caused confusion. His charge on the point was clear and helpful. He told the jury at least twice that the burden was on the United States to establish defendant's guilt beyond a reasonable doubt and told them, too, that the burden did not shift. He left it to the jury to find whether the defendant obtained the gun subsequent to June 30, 1938 and emphasized to them that they were the sole judges of the facts concerning this statement especially as to the testimony offered by the defendant. Then he repeated the ultimate issue in the final paragraph of his charge. We think this left the matter clearly to the jury in a way in which they could understand and gave the defendant the full benefit of the testimony of his witnesses if that testimony was to be believed. More than this he cannot ask.

Constitutionality of the Statutory Presumption

By far the most difficult problem in this case is the constitutionality of a presumption created in § 902(f). After declaring it unlawful for any person convicted of a crime of violence to receive any firearm in interstate or foreign commerce, the provision is that the possession of a firearm by such person shall be presumptive evidence that such firearm was received by such person in violation of the chapter.[26] The appellant did not press this point in his main brief or oral argument, though he discusses that portion of the government's argument in his reply brief. Nevertheless, because this is the first time the statute has [fol. 134] been before an appellate court for consideration we think that fairness to the accused requires consideration of this problem as well as the other points already discussed.

The obvious offhand response to such presumption in a criminal statute is that it violates the fundamental concept that a man is innocent until proved guilty by putting on him the burden of producing the facts which establish his innocence. Such a sweeping objection comes many years too late.[27] Mr. Justice Lurton, speaking for the Supreme Court

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[26] 15 U. S. C. A. (1939) Ch. 18.

[27] See note, Statutory Presumptions and Due Process of Law (1929) 43 Harv. L. Rev. 100.

in Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43 (1910), stated a test that has many times been repeated. "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process • • • [if there is] some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." This test was approved and applied fifteen years later to uphold a criminal prosecution under a statutory presumption in the Harrison Narcotics Act, Yee Hen v. United States, 268 U. S. 178 (1925). More recently, the late Mr. Justice Cardozo, speaking for the Court in Morrison v. California, 291 U. S. 82, 88 (1934), states the testament somewhat more broadly. "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

The problem, therefore, becomes much narrower than at first appears, in view of the test of the constitutionality [fol. 135] above set out. So far as the application to the facts of this case are concerned, we think the considerations show that the presumption is constitutional as applied to an interstate commerce shipment whether the more limited formula of the Turnipseed case or the broader generalization found in the Morrison case is followed. The gun in question certainly had two interstate journeys because it was proved that it was originally shipped from Connecticut to Illinois and it was found in the defendant's possession in New Jersey. Acquisition in New Jersey under the New Jersey law would not have been easy. New Jersey, in common with many other States,[28] has rather stringent regu-

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[28] For a collection of State regulations, see 3 Prentice-Hall 1942, Fed. Tax. Serv. Par. 31502. For New Jersey specifically, see N. J. Rev. Stat. (1937) 2:176—3, 4, 5, 8, 33, 44.

lations surrounding the transfer of firearms of this type. The tendency is to require such transfers to be open, to make them more difficult and certainly to put obstacles in the way of acquisition by persons of criminal records like that of the defendant.

Furthermore, Congress had, when the Federal Firearms Act was under consideration, evidence dealing with the interstate activity of armed law breakers.[29] In determining the constitutionality of the legislative solution of a problem courts are not to ignore the existence of such facts before legislative bodies even though the evidence of those facts is not part of the record in a particular case. United States v. Carolene Products Co., 304 U. S. 144 (1938). We think these considerations are sufficient to protect the statute created presumption from the charge of arbitrariness.

The scholarly counsel for the government presented another basis on which the presumption might be upheld. [fol. 136] It is based upon the decision in Ferry v. Ramsey, 277 U. S. 88 (1928). There the Supreme Court upheld the constitutionality of a statute imposing civil liability upon a bank director for assenting to the receipt of deposits after knowledge of insolvency of the bank adding a presumption of knowledge of insolvency and assent to receipt where deposits were so received. Through Mr. Justice Holmes the majority of the Court recognized that the legislature had power to impose the liability regardless of knowledge. That being so, to do something less, in terms of a statutory presumption, is not unconstitutional. On that foundation the argument is made that Congress, under the commerce clause, could have made it a substantive crime for persons with records like that of the defendant to possess guns upon the theory that criminals with guns are the kind most

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[29] 1 Hearings before Senate Subcommittee of the Committee on Commerce, pursuant to S. Res. 74, 73rd Cong., 2nd Sess. (1933) 9. The Federal Firearms Act was partly the result of the evidence adduced at these hearings authorized by S. Res. 74, entitled: A Resolution Authorizing an Investigation of the Matter of So-called "Rackets" with a View to Their Suppression. See S. Hearings, supra, f.n. 8 pp. 1, 19 and H. R. Hearings, supra, f.n. 8 pp. 3, 4.

likely to engage in interstate journeys.[30] The argument then concludes that if possession itself could have been penalized under the interstate commerce power, a statutory presumption of interstate shipment. however inept a way of reaching the same result, is not unconstitutional. This may be sound. We do not deem it necessary to go so far in this case. As stated above, we believe the presumption of interstate shipment can be sustained under orthodox formulae many times enunciated.

We now come to the last question, that of the application of the statutory presumption as to the time of the acquisition of the weapon found in the possession of the defendant. The statute became effective July 30, 1938. § 906. The trial judge's instruction told the jury that the presumption was that the gun was shipped in interstate commerce if the jury found defendant obtained it subsequent to June 30, 1938.[31] The only direct evidence bearing [fol. 137] on time of acquisition was that given by the defendant and his wife and sister. This testimony the jury evidently disbelieved as shown by its verdict of guilty. But without positive testimony by the government showing the time of acquisition the verdict cannot stand unless the statutory presumption applies both to the interstate commerce nature of the transaction and to the time thereof. If it does the defendant has no ground for complaint by reason of the jury's failure to follow the trial judge's instruction.

We have no doubt that the possession of the firearm by

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[30] See S. Hearings on "Rackets" supra, f.n. 29, v. 1, pt. 2, pp. 220, 261, pt. 3, pp. 276, 354. See also, Department of Commerce, Bureau of the Census, The Prisoner's Antecedents (1929) p. 12, table 5, and pp. 54-57, table 36, showing the tendency of criminals to roam, specifically indicating the correlation between gun offenders and non-residency in the state where the offenses were committed.

[31] The statute was enacted June 30, 1938, but became effective by its terms, 30 days thereafter. The instruction was therefore incorrect in placing emphasis on the June 30 date. As we view the case, however, this was harmless error. There was no evidence whatever indicating acquisition of the weapon between June 30 and July 30. If the defendant's evidence was to be believed, he had acquired the gun years before.

one of the class of persons designated in the statute is intended to be treated as presumptive evidence both of the fact of interstate shipment and the time of receipt by such person. The words used quite evidently relate to the whole statute. "• • • possession • • • shall be presumptive evidence that such firearm • • • was shipped • • • or received, • • • by such person in violation of this chapter." § 902(f). The chapter is the whole statute including § 906 which provides for its effective date and ending with § 909 giving its short title.[32] White v. United States,[33] a case under the importation section of the Harrison Narcotics Act, is an authority in point in the application of the "presumptive" evidence provision to the time element.

Can presumption of acquisition in violation of the law be constitutionally applied? The government frankly admits that tested alone by the rational connection[34] between the fact proved and the fact presumped, presumption is indefensible. The evidence showed that the gun was shipped by its manufacturer in 1919 and that Tot was arrested and [fol. 138] the weapon seized in September, 1938. The likelihood that he acquired it in the short time between the effective date of the statute and the date of his arrest is admittedly slight.

But on the question of opportunities for knowledge mentioned in the phrasing of the test by Mr. Justice Cardozo, in the Morrison case, cited above, there is much more to be said. A man in possession of the gun is certainly in a position to know better than anybody else, when he got it. The statute does not, as warned against in the Turnipseed case, at page 43, "operate to preclude the party from the right to present his defense from the main fact thus presumed". The defendant in this case did present his evidence. It would clearly, if believed, have established possession long

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[32] One section of the statute (§ 904) expressly deals with exceptions. Certain persons are excepted and so also, certain firearms; these are those which are "antique or unserviceable." This case is not concerned with them.

[33] 16 F. (2d) 870 (C. C. A. 9, 1926), cert. den. 274 U. S. 745 (1927).

[34] As stated in the Turnipseed case, supra.

ıte was passed. That the trier of the fact
one's story is a risk common to all litigants,
be granted that it bore particularly hard
e previous criminal record was already in
ıt be borne in mind that the legislation here
in its scope as directed against all citizens
ı of inherently innocent objects. It is deal-
ıs. And it is directed only at that narrow
ı already been convicted of crimes of vio-

may be approached from another angle
ne result. That the legislature in accom-
ittedly lawful and constitutional object may
t sought by a means which when considered
ight be unconstitutional is well established.
mes states the point in characteristic epi-
the law allows a penumbra to be embraced
l the outline of its object in order that the
cured."[35] The concept is no stronger or no
ıg it the penumbra doctrine.[36] There are
ous instances of this power. Thus a statute
e removal of original marks from imported
onstitutional, even after the latter have
State, as one reasonably calculated to ren-
principal requirement that the goods bear
me of importation. United States v. Ury,
C. C. A. 2, 1939). A State statute forbid-
sion of game during the closed season is
en if applied to game taken elsewhere and
State. Silz v. Hesterberg, 211 U. S. 31
ions requiring certain labeling of denatured
ble as a beverage, were upheld within the
ss under the Eighteenth Amendment. Selz-

v. Wisconsin, 270 U. S. 230, 241 (1926). The
n the dissenting opinion. The presumption
tion in that case was a so-called "conclusive
hich, of course, presents quite a different
e one under consideration here.

r, Black, The Penumbra Doctrine and Pro-
ment (1933) 27 Ill. L. Rev. 511, where the
its application in a series of prohibition

man v. United States, 268 U. S. 466 (1925). So, too, forbidding the prescribing of intoxicating malt liquors for medicinal purposes was upheld as an aid to prohibition enforcement. Everard's Breweries v. Day, 265 U. S. 545 (1924). Likewise, the forfeiture of empty barrels, bottles, corks and cartons was sustained. Danovitz v. United States, 281 U. S. 389 (1930). The list which does not pretend to be exhaustive, may be closed with reference to United States v. Darby, 312 U. S. 100 (1941), a case under the Fair Labor Standards Act, where the Court said "• • • Congress • • • may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of intrastate transactions is an appropriate means of the legitimate end."

The social end sought to be achieved by this legislation, the protection of society against violent men armed with dangerous weapons, all would concede to be fundamental in organized government. The entry of the federal authority in the field to help accomplish this purpose has not been challenged. It has been taken for granted by both sides in the discussion of this case. We also think it may be assumed. In accomplishing the admittedly constitutional object we do not think the means taken by this statute, while stringent, have become so oppressive and arbitrary that we are en-[fol. 140] titled to say that Congress has exceeded its authority in acting without due process of law.

The judgment is affirmed.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 141] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1941

No. 7961

United States of America

vs.

Frank Tot, Appellant

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the — District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

October 28, 1942. Goodrich, Circuit Judge.

Endorsements: Order Affirming Judgment. Received & Filed Oct. 28, 1942. Wm. P. Rowland, Clerk.

[fol. 142] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the briefs for Appellant and Appellee, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States of America vs. Frank Tot, Appellant, No. 7961, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 23rd day of November in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 112] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 569

ORDER ALLOWING CERTIORARI—Filed January 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the 4th and 5th questions stated in the Government's memorandum.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 113] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 569

STIPULATION WITH RESPECT TO RECORD—Filed January 25, 1943

It is hereby stipulated and agreed by and between the attorneys for the above-named parties that the record filed in this court with the petition for certiorari, consisting of 111 printed pages, may be used in the hearing of this case on the merits without further printing.

It is further stipulated and agreed that the original transcript of testimony and all documentary exhibits may, however, be filed in this court, as additional portions of the record of the case, for the use of either party or the court.

Frederic M. P. Pearse, Counsel for Petitioner.
Charles Fahy, Solicitor General, Counsel for Respondent.

[fol. 114] [File endorsement omitted.]

No. 589

IN THE

Supreme Court of the United States

FRANK TOT,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner

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Supreme Court of the United States

FRANK TOT,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit on the grounds that among the questions involved is one of vital interest to the administration of justice involving a construction of Federal Firearms Act of 1938, 15 U. S. C. 902f; another involving a determination of the proof necessary to overcome a presumption created by a statute and a third involving a question of unlawful search and seizure and two other questions involving the constitutionality of the statute. The decision of the Circuit Court of Appeals on these questions is in conflict with decisions of

other Circuit Courts and this Honorable Court and is contrary to the weight of authority.

2. Petitioner was indicted in the United States District Court for the District of New Jersey on an indictment containing one count which charged that petitioner, being a person who had previously been convicted of crime, did on September 22, 1938 receive a certain pistol which had been shipped and transported in interstate commerce to the City of Newark, New Jersey, contrary to the terms of the Federal Firearms Act, 15 U. S. C. 902f.

3. The pistol referred to in the indictment was seized by Federal Officer while searching petitioner's home after his arrest therein.

4. Before the trial a motion was timely made on petitioner's behalf for the suppression and the return of the pistol seized during the search of his home; objection was made to its admission at the trial; a motion was made at the end of the government's case to strike the pistol from evidence; before the trial a motion was made to quash the indictment on the ground that the statute under which it was brought was unconstitutional; a motion was made at the end of the government's case to dismiss the indictment and direct a verdict of not guilty on the ground that no proof was offered to show that the pistol was ever anywhere but in the State of New Jersey and the further ground that the pistol was not a firearm within the meaning of the Federal Firearms Act; at the end of the case a motion was made for a directed verdict on the same grounds urged at the end of the government's case and upon the further ground that the presumption created by the statute had been overcome by the testimony offered on petitioner's

behalf and therefore there was nothing for the jury to decide. All of these motions were denied.

5. The jury returned a verdict of guilty and petitioner moved to set this verdict aside on the ground that the pistol involved was not a firearm within the meaning of the act under which the charge was laid and the further ground that the evidence offered by petitioner at the trial had rebutted the presumption created by the statute and therefore the trial court should not have submitted the case to the jury. This motion was denied and petitioner was sentenced to three years imprisonment.

6. An appeal from this judgment was taken to the United States Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court on October 28, 1942.

II.

Questions Presented.

The questions presented are:

1. Whether or not the Federal Firearms Act of 1938, 15 U. S. C. 902f is constitutional.

2. Whether or not the search of petitioner's house and the seizure therein of a pistol was a violation of the rights guaranteed to him under the United States Constitution.

3. Whether or not where the undisputed evidence shows that petitioner received the pistol in intrastate commerce the case may nevertheless be submitted to the jury because of a statutory presumption.

4. Whether or not the gun involved was one referred to in the statute.

III.

Statement of the Case.

On the morning of September 22, 1938 four agents of the Federal Bureau of Investigation armed with a warrant for the arrest of Frank Tot, which warrant charged him with the theft of cigarettes from an interstate shipment, went to his dwelling house and placed him under arrest. After his arrest the agents proceeded to search his home.

At the time the defendant was arrested he was in the kitchen of his home. While the search of his home was being made and while the defendant was either in the kitchen or the bedroom inquiry was made of him as to whether or not he had a gun in the house. He replied in the affirmative; told the agents where it was; and they found a 32 Colt automatic pistol in the pocket of a coat hanging in a wardrobe closet.

Defendant Frank Tot claimed that the pistol had been in his possession since 1933 or 1934.

He had previously been convicted of a crime of violence.

The pistol did not have a firearm muffler or silencer attached to it nor was it so constructed that one could be so attached.

IV.

Statutes Involved.

15 U. S. C. 902f.

> "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."

15 U. S. C. 901-3.

> "The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer or any part or parts of such a weapon."

V.

Reasons for Allowance of a Writ.

1. The Circuit Court of Appeals in effect decided that Congress may enact legislation that infringes the rights guaranteed to persons under the Second Amendment to the Constitution of the United States.

The decision of the Circuit Court of Appeals conflicts with the decisions of *U. S.* v. *Cruikshank*, 92 U. S. 533; *Presser* v. *Illinois*, 116 U. S. 252 and other representative cases

and authorities cited in our argument which hold that thes rights cannot be infringed by Congress.

2. The Circuit Court of Appeals in effect decided that even if a statute is clear and unambiguous on its face you may go back of the statute in order to place a construction on it most unfavorable to the accused.

The decision of the Circuit Court of Appeals conflicts with the decision of *Ruggles* v. *Illinois*, 108 U. S. 526, and other representative cases and authorities cited in our argument which hold that a statute should be given the construction most favorable to the accused and if it is plain, certain and unambiguous so that no doubt arises from its own terms as to its scope and meaning a bare reading suffices and interpretation is needless.

3. The Circuit Court of Appeals in effect decided that an expioratory search and seizures of a person's home and effects is permissible.

The decision of the Circuit Court of Appeals conflicts with the decisions of *Lefkowitz* v. *U. S.*, 285 U. S. 452; *Go Bart Co.* v. *U. S.*, 282 U. S. 344; *Weeks* v. *U. S.*, 232 U. S. 383; *Agnello* v. *U. S.*, 279 U. S. 20; *Amos* v. *U. S.*, 255 U. S. 313; *Duke* v. *U. S.*, 275 U. S. 142 and other representative cases cited in our argument which hold that general exploratory searches are unreasonable and are forbidden by the Fourth Amendment; that a warrant for the arrest of a person does not give the holder of the warrant the right to search the home of the accused after making the arrest; and that peaceful submission to a search after arrest is not a waiver of one's constitutional rights.

4. The Circuit Court of Appeals misconceived the effect of a statutory presumption and disregarded the uncontra-

dicted facts and considering the case on these erroneous assumptions held that the motions for directed verdicts were properly denied.

In failing to consider the case on the facts before it, in giving the statutory presumption greater effect and weight than should have been given to it and in rendering its decision based upon a presumption and not upon facts the Circuit Court has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its powers of supervision over the decision below.

5. The Circuit Court of Appeals refused to take into consideration the time element involved in the case and the likelihood that one who had a criminal record would in all probability have had in his possession a pistol for a great deal longer period of time than the two month period that passed between the effective date of the statute and the date of arrest.

In failing to consider this element the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its powers of supervision over the decision below.

6. That the Circuit Court of Appeals in effect decided that the presumption created by the statute involved operated to deny a defendant an opportunity to rebut it.

The decision of the Circuit Court of Appeals conflicts with the decision of *Bailey* v. *Alabama*, 219 U. S. 219; *Manley* v. *Georgia*, 279 U. S. 1; *Mobile* v. *Turnipseed*, 219 U. S. 35, and other cases cited in our argument which hold that a statute which creates a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.

7. That the Circuit Court of Appeals in effect decided that there was a rational relation between the fact proved and the ultimate fact presumed.

The decision of the Circuit Court of Appeals conflicts with the decision of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Western R. R. Co.* v. *Henderson*, 279 U. S. 639; *Morrison* v. *California*, 291 U. S. 82, and other cases cited in our argument which hold that where a statute creates a presumption there must be a rational relation between the fact proved and the ultimate fact presumed or the statute violates the due process clause of the Fourteenth Amendment to the Constitution.

Wherefore your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be designated, a full and complete transcript of the record and of all the proceedings of the Circuit Court of Appeals in the said case entitled in that court: *United States of America* v. *Frank Tot, Appellant*, No. 7961, October Term, 1941, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court and for such other and further relief as to this Court may seem proper and just.

FRANK TOT.
By FREDERIC M. P. PEARSE,
Attorney for and of Counsel
with Petitioner.

Supreme Court of the United States

FRANK TOT,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed on page 93 of the record.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, C. 299, 43 Stat. 938 (28 U. S. C. 347).

2. The judgment of the Circuit Court of Appeals was entered October 28, 1942.

III.

Statement of the Case.

The facts in the case have already been related in the preceding petition under Title III.

IV.

Argument.

(a) The search of petitioner's home and the seizure therein of a pistol was violative of his rights under the Fourth and Fifth Amendments.

The federal officers entered defendant's home, placed him under arrest and then proceeded to search his dwelling house for evidence of some crime and found a pistol.

The Circuit Court of Appeals held that there was no error in the trial court's denial of defendant's motions to suppress the pistol found in defendant's home and that it was properly admitted in evidence.

In reaching its conclusion the learned court failed to follow the decision of this Court in *Lefkowitz* v. *U. S.*, 285 U. S. 452 and the decisions of *Go Bart Co.* v. *U. S.*, 282 U. S. 344; *Taylor* v. *U. S.*, 286 U. S. 1; *Carroll* v. *U. S.*, 267 U. S. 132; *Byar* v. *U. S.*, 273 U. S. 28; *Weeks* v. *U. S.*, 232 U. S. 383; *Agnello* v. *U. S.*, 279 U. S. 20; *Amos* v. *U. S.*, 255 U. S. 313; *Dukes* v. *U. S.*, 275 U. S. 142; *Gouled* v. *U. S.*, 255 U. S. 298, and other representative decisions.

The authorities hold that though a warrant of arrest permits an officer to go anywhere to search for an accused

for the purpose of arresting him it can never be used for the purpose of searching for evidence upon which to base a prosecution. Nor after making an arrest has such officer the right to make an exploratory search of the home of the one arrested, even if he be arrested there, to obtain evidence. Nor can such a search be justified as incident to the arrest.

The authorities further hold that an unlawful search can never be justified by what it brings to light nor can the results of a search which violates our constitutional guarantees ever justify the unlawful means used to find the evidence seized.

The authorities still further hold that the actions of one who after arrest does not object to a search of his premises do not amount to a waiver of his constitutional rights, for such action is merely a peaceful submission to the officer's wishes after a display of authority by the officers.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Honorable Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(b) The Circuit Court of Appeals did not properly construe the meaning of the Statute.

In defining the term "firearm" the Congressional language states that it "means any weapon * * * which is designed to expel a projectile * * * by the action of an explosive and a firearm muffler or a firearm silencer, or any part or parts of such weapon."

The pistol here in question was not equipped with a silencer or muffler nor was it possible in the condition it was at the time it was found to attach a muffler or silencer to it. Therefore it could not possibly be a part of a combination of a pistol and muffler or silencer.

The Circuit Court of Appeals held that the plain unambiguous wording of the statute was not sufficient from which to find its meaning and examined its history, the previous drafts of the act and the matters discussed at Congressional hearing to arrive at its conclusion.

In arriving at its conclusion the learned court failed to follow the decisions of this Court in *Ruggles* v. *Illinois*, 108 U. S. 526 and the decision in *U. S.* vs. *Goldberg*, 168 U. S. 95, and other representative decisions.

The authorities hold that a legislative intention to be efficient as a law must be set forth in a statute. Once so set forth the intention of Congress is to be found by the principles and rules of exposition. If the statute is plain, certain and unambiguous so that no doubt arises from its own terms as to its scope and meaning a bare reading suffices and interpretation is needless. For where there is no ambiguity in the words used there is no room for construction.

They further hold that even if a statute is ambiguous the construction to be adopted by the courts should be that most favorable to the accused.

It is clear that a well defined conflict exists between the decision in the instant case and decisions in this Court hereinbefore referred to and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(c) The Statute violates the Second Amendment.

The Second Amendment to the Constitution of the United States provides:

> "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

The arm which was the subject matter of the instant case was a 32 caliber automatic pistol.

The Circuit Court of Appeals held that the statute did not violate the Second Amendment.

In reaching its conclusion the learned court failed to follow the decisions of this Court in *U. S.* v. *Cruikshank*, 92 U. S. 533; *Presser* v. *Illinois*, 116 U. S. 252 and *U. S.* v. *Miller*, 307 U. S. 174, and other representative decisions.

The authorities hold that the right to keep arms is not a right granted by the Constitution but is a right which existed long prior to its adoption. Neither is this right in any manner dependent upon that instrument for its existence. The Second Amendment declares that the right to possess arms shall not be infringed by Congress. The Second Amendment is one of the amendments that has no other effect than to restrict the power of the National Government and it leaves to the people the duty to look for their protection against any violation by their fellow citizens of the rights it recognizes to the powers which relate to merely municipal and state legislation which powers were not surrendered or restrained by the Constitution. However if Congress enacts any law infringing upon these rights it does so in violation of the Constitutional prohibition.

Thus in *U. S.* v. *Miller, supra,* this Court held that the National Firearms Act of 1934 was not violative of the Second Amendment because of the fact that the weapons referred to were not those known to military science. However the statute here being considered is totally different from the 1934 Act, in the opinion of the Circuit Court of Appeals, in that it includes any and all guns, pistols and revolvers.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(d) The Circuit Court of Appeals so misconceived the facts that its conclusion that the motions for directed verdicts were properly denied is erroneous.

The proofs on the part of the government showed possession of the pistol in the defendant just short of two months after the effective date of the statute, and also proof of prior conviction of the defendant of a crime of violence.

The proofs of the defendant showed continuous possession of the pistol in the defendant from a date several years prior to the passage of the statute.

Rebuttal testimony showed that the pistol had been shipped from Connecticut to Illinois in 1919.

The Circuit Court of Appeals held that there was no error in denial by the trial court of the defendant's motions for directed verdicts or in the trial court's refusal to charge the jury as requested.

In reaching its conclusion the learned court failed to follow the decisions of this Court in *Heiner, Collector of Internal Revenue* v *Donnan*, 285 U. S. 312; *Bailey* v. *Alabama*, 219 U. S. 219; *Manley* v. *Georgia*, 279 U. S. 1; *Mobile Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Morrison* v. *People of State of California*, 291 U. S. 82, and other representative cases.

The authorities hold that a presumption is never evidence but is merely a legal excuse, under certain circumstances, for not offering evidence and unless rebutted it may have the force and effect of actual evidence. However, if evidence is offered which even tends to rebut the presumption then the presumption ceases to be a factor for when facts appear the presumption disappears and facts are deemed to appear when evidence is introduced from which they may be found.

In this case, when the defendant and his witnesses took the stand and testified to possession by the defendant, long prior to the passage of the act, facts appeared, the presumption quit the arena and there was nothing left to submit to the jury.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

It is also submitted that if the Circuit Court of Appeals had considered the case on the facts before it it would have been obliged to reverse the conviction and in considering presumed matter after facts appeared and the presump-

tion had no further place in the case the court has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its powers of supervision over the decision below.

(e) The Statute violates the due process clause of the Fourteenth Amendment.

The Circuit Court of Appeals held that the statute did not violate the Fourteenth Amendment to the Constitution of the United States.

We do not contend that Congress cannot constitutionally set up a "statutory presumption".

We do contend that where Congress sets up such a presumption there must be some (1) rational relation between the fact proved and the ultimate fact presumed; and (2) that the presumption set up must not preclude one from the right to present his defense to the main fact so presumed.

We do contend that the presumption set up in the act of Congress here considered fails to square with these limitations.

The decision of the Circuit Court of Appeals conflicts with the decisions of *Bailey* v. *Alabama, supra, McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia, supra; Western R. R. Co.* v. *Henderson*, 279 U. S. 639; *Morrison* v. *California, supra;* and further, *State* v. *Besuick*, 13 R. I. 211; *State* v. *Katz*, 13 R. I. 528; *State* v. *Grummett*, 33 Idaho 203.

We submit that Congress is without constitutional power on the basis of mere possession of a firearm within a

State—a fact that the State has not made, and that Congress has not made, and could not make, a substantive offense—to set up a presumption that the arm possessed was shipped, transported or received "as the case may be" in interstate commerce.

The statutory presumption here involved not only provides for a presumption of shipping or transporting and receipt of the arm in interstate commerce from the unrelated fact of intrastate possession but also, in the opinion of the Circuit Court of Appeals, for a presumption as to the time of such receipt in interstate commerce.

The Circuit Court of Appeals held in effect that "possession" provides a basis for presumption that (a) the firearm was shipped in interstate commerce; (b) was received in interstate commerce, and (c) that it was so received after the effective date of the statute.

Surely there is no reasonable relation between the fact of possession on September 22, 1938 and the fact presumed of receipt in interstate commerce after the effective date of the statute, July 30, 1938, especially when the only scintilla of proof of interstate shipment relates to a date nineteen years earlier. Even the common law presumption arising from mere possession of stolen goods is limited to goods recently stolen.

We submit that if the statutory presumption here involved is sanctioned the door will be opened wide to deprive due process of substance and to break down the line which the Constitution drew between the powers granted to the Nation and those reserved to the States, through resort to devious "techniques".

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Court and it is respectfully submitted that there is a serious Constitutional question here involved that is of such importance that it should be decided by this Court.

Conclusion.

Your petitioner respectfully submits that the questions presented by the foregoing petition show a well defined conflict exists, between the decision of the Circuit Court of Appeals and the decisions of this Honorable Court and that there are involved important questions of constitutional and federal law which have not been but should be decided by this Court, and that these questions should be reviewed by this Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with
Petitioner.

No 569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

FRANK TOT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER.

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IN THE

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OCTOBER TERM, 1942.

FRANK TOT,

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vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER.

Reference to Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 74) is reported at 131 F. 2d 261.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered October 28, 1942. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended 28 U. S. C. A. 347. The petition to review the decision of the Circuit Court of Appeals herein was granted by this Court on January 11, 1943.

Statement of the Case.

(a) Statement of Question Involved.

1a: Whether the trial court erred in denying the motion of petitioner for a directed verdict of not guilty.

1b: Whether a presumption created by statute disappears when testimony which rebuts and is contrary to the presumed fact is put in.

2: Whether the statutory presumption provided in Section 2f of the Federal Firearms Act of 1938 (52 Stat. 1250, 15 U. S. C. 901-909) is constitutional.

(b) Constitutional and Statutory Provision Involved.

The pertinent parts of the Fifth Amendment to the Constitution and the pertinent provisions of the Federal Firearms Act of 1938 are printed in the Appendix.

(c) Statement of Proceeding.

An indictment was returned by the grand jury for the United States District Court for the District of New Jersey charging petitioner, a person who had previously been convicted of a crime of violence, with having knowingly, unlawfully and feloniously received a thirty-two calibre Colt automatic pistol which had been shipped and transported in interstate commerce in violation of the Federal Firearms Act (Title 15 U. S. C. 902f.)

A motion was made to quash the indictment which was denied.

The case proceeded to trial before the court and a jury. At the close of the government's case a motion was made for a directed verdict. The motion was denied and an exception was prayed for and allowed. At the end of the entire case a motion was again made for a directed verdict. This motion was also denied and an exception was prayed for and allowed. The jury returned a verdict of guilty. A motion was then made to set aside the verdict and grant a new trial. This motion was denied. The court sentenced petitioner to imprisonment for a period of two years.

(d) Statement of Facts.

In the early morning of September 22, 1938, agents of the Federal Bureau of Investigation armed with a warrant for the arrest of Frank Tot, which warrant charged him with theft from an interstate shipment, went to his home in Newark, New Jersey, for the purpose of arresting him and searching his home. The premises to be searched, which were occupied by Frank Tot as a residence, were located on the second floor of a two-family dwelling. Upon arriving at the premises two of the agents remained in the front of the house while two others went to the rear. The two agents who went to the rear of the house were admitted by petitioner to the portion of the premises in which he lived. He was placed under arrest and one of the agents went to the front of the building and admitted the other two agents and then a search of the premises was begun. One of the agents went to a wardrobe and found in the pocket of a coat hanging there a 32 calibre Colt Automatic Pistol. This pistol had been manufactured by the Colt Com-

pany and shipped by them on September 23, 1919 to Chicago, Illinois.

Some years previous to his arrest on this day Frank Tot had been convicted of a charge of assault and battery and a charge of breaking and entering.

The pistol which was seized was obtained by petitioner some time in 1933 or 1934 and had been continuously in his possession from then up until the date of its seizure.

The statute under which the indictment was drawn was effective as of July 30, 1938.

(e) Specification of Errors Intended to Be Urged.

1: Whether or not where the undisputed evidence shows that petitioner received the pistol in intrastate commerce the case may nevertheless be submitted to the jury because of a statutory presumption.

2: Whether or not the Federal Firearms Act of 1938, 15 U. S. C. 902f is constitutional.

(f) Summary of Argument.

Both the trial court and the Circuit Court of Appeals held that the motions for direct verdicts were properly denied and that Section 2f of the Federal Firearms Act of 1938 does not violate the Constitution.

Petitioner contends:

1: That the motions for directed verdict should have been granted.

This proposition is supported by the following:

A: The government offered no evidence on its original case to show that the pistol had ever been in interstate commerce.

B: The government relied entirely upon the presumption created by statute. The petitioner testified and offered other evidence which contradicted the presumption. The presumption having been contradicted and the government have failed to offer proof to rebut this there was nothing in the case to submit to a jury.

2: That section 2f of the Federal Firearms Act of 1938 is violative of the Fifth Amendment to the Constitution.

This proposition is supported by the following:

A: The presumption contained in the statute constitutes a deprevation of liberty without due process of law.

B: There is no rational relation between the fact proved and the ultimate fact presumed.

C: The presumption set up precludes one from the right to present his defense to the main fact presumed.

ARGUMENT.

POINT I.

There was no question of fact in the case to submit to a jury for its consideration.

The trial court erred in denying the motions for directed verdicts of "not guilty" because of the fact that the presumption created by statute disappeared as the result of contrary testimony being introduced.

In the trial of the case the Government in the first instance proved that the pistol was found in the possession of petitioner and the pistol was offered and admitted in evidence. It also proved, that the petitioner had been convicted of crimes involving violence. The Government then rested.

Petitioner took the stand and testified that he had been in possession of the pistol which was in evidence since 1933 or 1934, a number of years prior to the enactment of the statute under which the indictment was drawn. This testimony was corroborated by two other witnesses.

In rebuttal the Government offered evidence to show that the pistol in question had been shipped from Connecticut to Illinois in 1919 and then rested its case.

The foregoing recitation of the facts covers all of the facts which are pertinent to the question raised under this point.

That a person charged in an indictment with the crime is presumed to be innocent until proven guilty beyond a reasonable doubt is one of the fundamentals of our system of jurisprudence and of the essential substance of trial by jury as guaranteed by the Constitution.

In the instant case the Government offered no evidence whatsoever to show that petitioner committed the offense charged in the indictment but relied solely and exclusively upon the presumption created by the statute.

Though the law in its development has permitted the enactment of statutes which create presumptions it has been uniformly held that any statute which creates a presumption which operates to deny a fair opportunity to rebut it is in violation of the Constitution.

Heiner, Collector of Internal Revenue vs. *Donnan, et al.*, 285 U. S. 312;
Bailey vs. *Alabama*, 219 U. S. 219;
Manley vs. *Georgia*, 279 U. S. 1;
Mobile, Jackson & Kansas City R. R. Co. vs. *Turnipseed*, 219 U. S. 35.

A statutory presumption even if valid, and we contend in the following point that the presumption here is invalid, can never take the place of the utter lack of evidence shown here. The presumption in this statute is only *prima facie* evidence. When petitioner took the witness stand and testified that he had purchased the pistol in intrastate commerce and had had possession of it long prior to the enactment of the statute the presumption vanished. Therefore, it could not support a conviction in the absence of evidence that the pistol had been shipped and transported and received in interstate commerce subsequent to the effective date of the statute.

The limits of the rule that the burden of proof may be shifted from the Government to a defendant in a criminal prosecution are in substance that the Government shall have proved sufficient to make it just for the defendant to be required to repel what has been proved with excuse or explanation or at least that upon the balancing of conveniences or of the opportunities for knowledge the shift of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Morrison vs. *People of State of California*, 291 U. S. 82;
Yee Hem vs. *United States*, 268 U. S. 178.

The peculiar effect of a presumption of law is merely to invoke a rule of law compelling the jury to reach a conclusion which squares with the presumption in the absence of evidence to the contrary. If evidence is offered contrary to the presumption the presumption disappears and the case is ~~in~~ the hands of the jury free from any rule of presumption.

Wigmore on Evidence, 3rd Edition, Section 2491.

The effect of a presumption is to envoke a rule of law which compels the jury to return a verdict in accordance therewith, in the absence of any evidence to the contrary from the other side. If the opponent does present such evidence, then the presumption vanishes, and the jury may consider the proof free from any such rule. Thus, the presumption that death resulted from an accident or natural causes rather than from suicide, the presumption of due care or freedom from negligence, the presumption that an official or official body charged with the performance of governmental duties acted honestly in his or its official duties, the presumption of good character in behalf of the defendant in a criminal prosecution or the presumption of the relationship of master and servant existing between the owner of a car and the driver thereof when met by rebutting proof is not evidence and is not to be treated as such by the jury in arriving at a verdict. Such a presumption merely aids in establishing a *prima facie* case and has no probative effect when countervailing proof is given.

The presumption alone contributes no evidence but merely takes the place of evidence temporarily and if and when evidence is introduced to rebut the presumption it

disappears and goes for naught. For the rule is that presumptions disappear when facts appear and facts are deemed to appear when evidence is introduced from which they may be found.

Ryrrell vs. *Prudential Insurance Co.*, 192 Atl. 184;
Essmeister vs. *Roadway Transit Co.*, 275 Mich. 387;
Normandin vs. *Parentean*, 150 Atl. 460;
Carroll vs. *Prudential Insurance Co.*, 15 Atl. 2d 810;
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Alpine Forwarding Co. vs. *Pennsylvania Railroad Co.*, 60 Fed. 2d 734;
Connecticut Mutual Life Ins. Co. vs. *Lanahan*, 112 F. 2d 375;
20 Am. Jr. 179, evidence Sec. 166;
Minutella vs. *Providence Ice Cream Co.*, 144 Atl. 884;
Rhodes vs. *Pennsylvania R. R. Co.*, 147 Atl. 854;
E. S. Co., Inc. vs. *Rocheleau*, 161 Atl. 145;
Waters vs. *Western & Southern Life Ins. Co.*, 178 Atl. 499;
Kelly, et ux. vs. *Hudson Coal Co.*, 179 Atl. 753;
Domanawski vs. *Prudential Insurance Co.*, 182 Atl. 906.

Petitioner, rebutted the presumption by direct testimony that the pistol was not received by him in interstate commerce but was in fact received by him in intrastate commerce long prior to the enactment of the statute.

Though he was not corroborated in his testimony as to how he obtained possession of the pistol he was corroborated as to the time of acquisition. This evidence having been offered the presumption quit the arena and had no probative force and effect and left the case barren of any

evidence whatsoever of the commission of the crime charged.

McIver vs. *Schwartz*, 145 Atl. 101;
Caswell vs. *Maplewood Garage*, 149 Atl. 747;
Podolsky, et al. vs. *Sautter*, 133 Atl. [illegible]

It has been the contention of the Government that the case was rightfully submitted to the jury because of the fact that the jury should have a right to decide upon the credibility of the petitioner and his witnesses.

Can it be successfully stated that a presumption has credibility; that a presumption has probative force or effect? If a presumption is given such force and effect is it not in effect unrebuttable? If it has such force and effect is it reasonably possible for one who has been convicted of crime to combat it?

The law is clear that a defendant need not conclusively prove beyond all doubt that he is innocent of the charge contained in the indictment but need merely deny the *prima facie* case proven by the use of the presumption. If this denial is uncontradicted there remain no facts to present to the jury.

Even if the testimony of the witnesses called by the defendant might not be believed by the trial court, their testimony standing uncontradicted by other testimony, the presumption is rebutted.

Hoffman vs. *Lassaeff*, *supra*;
McIver vs. *Schwartz*, *supra*.

The only question of fact involved in the instant case insofar as this point of our argument is concerned is whether

or not the petitioner received the pistol after it had been shipped or transported in interstate commerce subsequent to July 30, 1938, the effective date of the statute. Proof of this was utterly lacking and the presumption created by statute was invoked to take the place of evidence which under ordinary circumstances would have been required to prove a *prima facie* case. The testimony of petitioner and his witnesses clearly rebutted the presumption. This testimony was neither contradicted in itself nor were any witnesses called to contradict it. In view of this the presumption quit the arena and there was no question of fact to submit to the jury.

The fact that the jury did not believe the defendant's story of how he obtained the pistol is of no importance. There are hundreds of other ways in which he could have obtained it; all through intrastate commerce. The fact that the jury did not believe the defendant's story still does not prove that the pistol was received in interstate commerce.

If the statute means that the defendant must have received, shipped or transported the article in the course of interstate commerce the court should have directed a verdict of not guilty because it must be conceded that there was no evidence of such fact.

Where there is no evidence to support an indictment it is the duty of the trial court to direct a verdict of not guilty or to dismiss the indictment.

Kassen vs. *United States*, 87 F. 2d 183.

It is therefore respectfully submitted that the trial court erred in denying petitioner's motions for directed verdicts of acquittal both at the end of the Government's case and at the end of the entire case.

POINT II.

The Statutory presumption is unconstitutional.

A second and independent ground for setting aside the conviction and discharging of petitioner is that the statutory presumption is invalid because it is violative of the Fifth Amendment to the Constitution of the United States.

If the statutory presumption set up in the statute in question is to have the effect which the Government has contended should be given to it it would take from the constitution guaranty of due process all substance by opening wide the door to legislative evasion of the fundamental purposes of its guaranty which is rooted in sad experience with governmental oppression; rotted in "blood, sweat and tears".

We do not contend that Congress cannot constitutionally set up a statutory "presumption" we do contend however that where Congress sets up such a presumption there must be some (1) rational relation or connection between the fact proved and the ultimate fact presumed; and (2) that the presumption set up must not preclude one from the right to present his defense to the main fact so presumed.

We do contend that the presumption set up in the statute here considered fails to square with these limitations.

Miyshi v. United States, 131 F. 2d 614;
Bailey v. *Alabama*, 219 U. S. 219 (1911);
McFarland v. *American Sugar Refining Co.*, 241 U. S. 79 (1916);
Manley v. *Georgia*, 279 U. S. 1 (1928);
Western R. R. Co. v. *Henderson*, 279 U. S. 639 (1928);

Morrison v. *California*, 291 U. S. 82 (1934);
State v. *Beswick*, 13 R. I. 211;
State v. *Katz*, 13 R. I. 528;
State v. *Grimmett*, 33 Idaho 203;
Casey v. *U. S.*, 276 U. S. 394;
Gloria v. *United States*, 231 U. S. 9;
Brightman v. *United States*, 7 F. 2d 532;
People v. *Licavoli*, 264 Mich. 643.

It is admitted that Congress may under its power to regulate interstate commerce make it unlawful for anyone to receive firearms shipped or transported in interstate commerce.

We submit however that Congress is without constitutional power on the basis of mere possession of a firearm within a State to set up a presumption that the arm possessed was shipped, transported or received "as the case may be" in interstate commerce.

In a long line of decisions including the decisions in the cases of

United States vs. *Darby Lumber Co.*, 312 U. S. 100;
Jacob Ruppert Inc. vs. *Caffe*, 251 U. S. 264;
Westfall vs. *United States*, 274 U. S. 256;
Shreveport Case, 234 U. S. 342;
Mulford vs. *Smith*, 307 U. S. 38.

It has been held that Congress has a right to regulate interstate commerce and to regulate intrastate transactions which are so co-mingled or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. However, though Congress has for illustration under these and similar decisions power to legislate as to the wages and hours of employees of the

operators of a loft building leased, though only in part, to tenants engaged in interstate commerce, the power does not extend to situations in which none of the tenants are engaged in interstate commerce.

No one could contend that it was within the power of Congress to set up on the basis of the mere fact of ownership, possession or operation of a loft building a presumption that the owners, possessors or operators and their employees were engaged in interstate commerce and that their activities in ownership, possession and control so affected interstate commerce as to bring their relations with their employees *prima facie* within the power of Congress and put upon them the burden of proof or of going forward with evidence, to establish, that they and their employees were not engaged in interstate commerce.

Congress has constitutional power under the commerce clause to prohibit the shipping, transporting or receiving of the manufactured products of child-labor in interstate commerce.

Would it be contended from this that Congress can set up a presumption that all products of child-labor possessed within a State were shipped, transported and received in interstate commerce?

Congress has constitutional power to prohibit the shipping, transporting or receiving of explosives in interstate commerce.

Does it follow that Congress has power to set up a presumption that all explosives possessed within a State shall be presumed to have been shipped, transported or received in interstate commerce?

We submit that none of these questions can be answered in the affirmative.

There is no rational relation between mere possession of a firearm in a State and the presumed ultimate fact of the receipt of such arm through shipment or transportation in interstate commerce.

Is it rational to presume the very fact upon which the power of Congress rests and to which it is limited—an act in interstate commerce—from the fact of mere possession; a fact that rests solely within the regulatory and prohibitive power of the State?

The cases on presumptions as to venue are of interest in this connection:

Brightman v. *U. S.*, 7 Fed. (2d) 532;
Crain v. *U. S.*, 12 Fed. (2d) 580;
Hood v. *U. S.*, 14 Fed. (2d) 925;
De Moss v. *U. S.*, 14 Fed. (2d) 1021;
O'Neill v. *U. S.*, 19 Fed. (2d) 322.

Mere possession is one thing. Receipt in interstate commerce is another.

The statute recognizes this in that it provides for drawing from the fact of "possession" another fact—not receipt—but receipt through shipment or transportation in interstate commerce.

The statutory presumption here involved not only provides for a presumption of shipping or transporting and receipt of the arm in interstate commerce from the unrelated fact of intrastate possession but also, if the government's claim is sound, for a presumption as to the time of such receipt in interstate commerce.

In order to sustain the conviction in the instant case it must be claimed that "possession" provides a basis for presumption that (a) the firearm was shipped in interstate commerce; (b) was received in interstate commerce; and (c) that it was so received after the effective date of the statute.

Surely there is no reasonable relation between the fact of possession on September 22, 1938 and the fact presumed of receipt in interstate commerce after the effective date of the statute, July 30, 1938, especially when the only scintilla of proof of interstate shipment relates to a date nineteen years earlier. Even the common law presumption arising from mere possession of stolen goods is limited to goods recently stolen.

Is it not beyond the realm of reasonable inference to presume on mere possession that on September 22, 1938 (a) receipt through interstate shipment, (b) receipt after July 30, 1938 of an interstate shipment?

Can a statutory presumption constitutionally wholly take the place of proof of guilt?

Can it constitutionally wholly take the place of proof of guilt beyond a reasonable doubt?

Can it constitutionally be made to take the place of proof as to the very fact upon which the constitutional power of Congress depends?

If it is to be contended that the presumption does not rest upon possession alone but that it rests upon possession by one "convicted of a crime of violence" that fact cannot overcome our argument. Just as there is no rational rela-

tion between mere possession and the receipt, after a given date, in interstate commerce, there is no rational relation between possession by one convicted of a crime of violence and the receipt after a given day in interstate commerce.

If the presumption that the pistol was received subsequent to the effective date of the statute must stand or fall under the "rational connection" test the presumption is patently indefensible, particularly, because of the tremendous disparity in opportunity of receipt before rather than after the statute.

The effective date of the statute was July 30, 1938, thirty days after passage. The possession of the pistol was proved as of September 22, 1938. But acquisition not possession in the substantive crime. Even disregarding petitioner's testimony of receipt in 1933 or 1934, the one fact remotely indicative of the time of acquisition is the date of the manufacturers shipment of the pistol, September 23, 1919, nineteen years almost to the day prior to the possession date. The chance of acquisition during the less than two months between enactment and proved possession rather than during the many years of the pistol's circulation prior to the enactment, is so negligible that the case had no right to go to the jury unless the statutory presumption from the possession went to the time as well as the manner of acquisition.

Therefore, it ought not to be concluded that Congress designed "reflexive reference" in setting up the presumption and included time of receipt in the presumption and if it should be so concluded and given such effect the presumption violates the "rational relation" constitutional limitation upon statutory presumption.

If the presumption be regarded as requiring a defendant to come forward with evidence of the actual details of an acquisition transaction before the statute it would be difficult to justify the presumption under the "accessibility of proof test" because of the difficulty of locating and stimulating the memory of a transferor as to a transaction which in the absence of a gun law might have been quite casual at the time.

As there is no rational relation between possession and the presumption that the pistol was received subsequent to the effective date of the statute and as the presumption cannot be justified under the "accessibility of proof test" what remains but to condemn the statutory presumption as violative of due process.

Between the enactment date and the effective date of the statute there was a period of thirty days during which the petitioner could have created evidence to show his possession prior to the effective date of the statute. However, can one before the effective date of a statute be put in a position requiring him, through an arbitrary presumption, to build up perpetuating testimony and be subjected to the risk of an unjust conviction because perchance his perpetuating witnesses are not credited or because the very making of the record for purposes of perpetuation raises doubt in the mind of the jury as to the truth of the fact sought to be substantiated by the record so made?

To say as the Government claims that where there is uncontradicted testimony that the acquisition of the pistol was in intrastate commerce and where there is no testimony that the pistol was acquired in interstate commerce, disbelief by the jury of the testimony as to the particular manner of acquisition in intrastate commerce lays the basis for

acquisition in interstate commerce resting solely on the statutory presumption, is to give the statutory presumption substantive evidential force.

Such claim by the Government involves not merely a claim that the statute shifts the burden of going forward but in fact a claim that it shifts to the accused the burden of proof.

If, as is the fact, composition of the jury as consisting of twelve members, and the requirement of unanimity in verdict are of the essence of trial by jury, as guaranteed by the Constitution, it is respectfully submitted that the requirement of proof of guilt beyond a reasonable doubt is equally of the essence of such trial.

It is respectfully submitted that if a statutory presumption is given the effect here claimed by the Government, the petitioner under the circumstances here present, is, as the accused, denied trial by jury according to the common law; denied the benefit of the common law presumption of innocence and of the common law rule against conviction except where guilt is established beyond a reasonable doubt.

Of what avail is it to say that one accused shall constitutionally enjoy the right to be confronted with the witnesses against him, if it be true that he may be convicted on the basis of a mere arbitrary presumption as to the fandamental fact upon which conviction under the statute must rest.

An arbitrary presumption is not constitutionally the equivalent of the constitutional right of one accused to be confronted by witnesses.

The Circuit Court of Appeals for the Sixth Circuit in construing the presumption in the Statute in question in the case of *Minski* v. *United States*, 131 F. 2d 614, said

> "The guaranty of the due process clause of the Fifth Amendment is, that a law shall not be unreasonable, arbitrary or capricious, and we think that the presumptive evidence clause of the act here involved must fall before the constitutional inhibition."

We therefore submit that for these reasons the statute is violative of the Fifth Amendment to the Constitution and therefore the conviction of petitioner should be reversed.

Conclusion.

We submit that the trial court erred in refusing to grant petitioner's motions for directed verdicts because of the fact that there was no evidence to submit to the jury.

We further submit that regardless of how the statute is otherwise construed the presumption contained in the statute is invalid and in violation of the constitutional prohibition.

We respectfully urge that the verdcit and sentence should be reversed and the defendant discharged.

Respectfully submitted,

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Of Counsel.

APPENDIX.

The pertinent part of the Fifth Amendment provides:

> "No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law • • •."

The pertinent parts of the Federal Firearms Act of 1938 15 U. S. C. 902f provides:

> "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."

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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1942

FRANK TOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 93) is not yet reported. The opinion of the district court overruling the demurrer to the indictment (R. 64) is reported at 36 F. Supp. 273, and its opinion overruling petitioner's motions to direct a verdict and to set aside the verdict (R. 67) is reported at 42 F. Supp. 252.

JURISDICTION

The judgment of the circuit court of appeals was entered October 28, 1942 (R. 93). The petition for a writ of certiorari was filed December 5,

1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the pistol introduced in evidence against the petitioner was seized in violation of the Fourth and Fifth Amendments.

2. Whether it was error for the circuit court of appeals to construe Section 1 (3) of the Federal Firearms Act in the light of its legislative history.

3. Whether the Federal Firearms Act violates the Second Amendment.

4. Whether the statutory presumption provided in Section 2 (f) of the act is constitutional.

5. Whether the presumption disappears the instant that some contrary evidence is put in.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Second, Fourth, and Fifth Amendments to the Constitution and the relevant sections of the Federal Firearms Act, 52 Stat. 1250, 15 U. S. C. 901–909, are set out in the Appendix, *infra*, pp. 15, 16.

STATEMENT

Petitioner was convicted (R. 54) in the United States District Court for the District of New Jersey under a one-count indictment charging a

violation of Section 2 (f) of the Federal Firearms Act, Appendix, *infra*, p. 16 (R. 3–4); the indictment alleged that petitioner had previously been convicted in the Special Sessions Court of Essex County, New Jersey, for the crime of assault and battery with intent to beat, wound, and ill-treat, and in the Quarter Sessions Court of Essex County, New Jersey, for the crime of breaking and entering at night with intent to steal, and that thereafter he "* * * did knowingly, unlawfully and feloniously receive a certain firearm, to wit, a thirty-two calibre Colt automatic pistol, which said pistol had been shipped and transported in interstate commerce to the said City of Newark from a place to the Grand Jurors unknown" (R. 4). Petitioner was sentenced to two years' imprisonment (R. 3).

The evidence adduced at the trial may be summarized as follows:

On the morning of September 22, 1938, Special Agents Madala, Flynn, Malone, and Dickstein of the Federal Bureau of Investigation, went to the apartment of petitioner and arrested him under a warrant of arrest which charged him with aiding and abetting a theft of cigarettes from interstate commerce (R. 6–7, 10, 12, 33, 34, 93). After arresting petitioner, the agents asked him if he had a pistol, and he answered that he had one in the pocket of a coat hanging in the wardrobe closet of his bedroom. One of the agents

thereupon took possession of the pistol (R. 8, 10, 13–14, 34), and it was introduced in evidence against petitioner at the trial (R. 8).

This pistol was a Colt .32 automatic, bearing serial number 310977 (R. 8–9). There is no muffler or silencer commercially made for this pistol (R. 84, 85, 91); however, the silencer or muffler commercially made for the .25 automatic pistol works satisfactorily with the .32 automatic if certain adjustments are made to it and the silencer (R. 81–83, 85–87, 91). Petitioner's pistol was not adjusted to permit the attachment of a silencer (R. 85–87).

The records of the Colt Patent Firearms Manufacturing Company, Hartford, Connecticut, show that the pistol was shipped from Hartford to Chicago, Illinois, on September 23, 1919 (R. 46). Petitioner testified that he purchased the pistol in New Jersey in 1933 or 1934 (R. 34–35, 39). His wife testified that she had seen it in petitioner's wardrobe at various times during the past five years (R. 40–42), and his sister testified that she had seen it in the same place at various times during the past six years (R. 43–45). However, on cross-examination, both the wife and sister admitted that they were not certain that the pistol which they had seen over the period testified to was the one in question, and admitted that the pistol which they had seen might have been a different one (R. 41, 44–45).

On June 22, 1935, petitioner had been convicted of assault and battery in the Special Sessions Court of Essex County, New Jersey, and on June 15, 1932, he had been convicted in another court of burglary (cf. R. 4 with R. 16–18).

ARGUMENT

I

In contending that his pistol was illegally seized (Pet. 10–11), petitioner assumes that it was seized in the course of a search violative of the Fourth and Fifth Amendments. The evidence does not support his contention.

The evidence concerning the search is found in the testimony of Special Agent Madala (R. 6–16) and in that of petitioner (R. 32–40). From Madala's testimony it appears that he and the other agents, armed with a warrant of arrest (R. 7), went to petitioner's apartment to arrest Lim and to search his premises (R. 12). After petitioner was arrested, he told Madala, in response to a question, that he had a pistol in the pocket of his coat hanging in the bedroom closet (R. 10). The pistol was taken from the coat while petitioner sat on the bed dressing (R. 10, 12, 13). It also appears that a search was made of petitioner's premises after the arrest (R. 7, 12). But at no point in his testimony did Madala make it clear whether the pistol was taken before or after the search of the premises was began (cf. R. 10 with

R. 12, 13), and unless it be considered that the pistol was seized during the course thereof, his testimony contains no details of the search. He did not state the parts of the premises which were searched, the purpose of the search, or what was taken as a result thereof. Petitioner's testimony is even more meager. The sum of it is that after the agents had arrested him in his kitchen they asked him if he had a revolver, and that then, upon his reply that he had one in a suit hanging in his bedroom closet, two of the agents went into the bedroom while the other two covered him with their pistols and kept him in the kitchen (R. 33–34). His testimony is otherwise bare of details of the seizure of the pistol and contains no mention whatever of the search of the premises.

The testimony of these witnesses, it is true, shows that petitioner's pistol was seized and that his apartment was searched. However, it does not follow from this without more that the pistol was seized and the premises searched in violation of his rights under the Fourth and Fifth Amendments. Those amendments do not prohibit all searches and seizures. The presumption that officers, in conformity with their official duties, make seizures and conduct searches in a manner consistent with those Amendments,[1] is, we submit, not here overcome. Particulars of the search and

[1] *Eaker* v. *United States*, 76 F. (2d) 267, 269 (C. C. A. 10); *Donahue* v. *United States*, 56 F. (2d) 94, 97 (C. C. A. 9); *United States* v. *Tatum*, 292 Fed. 497, 499 (N. D. Cal.).

seizure showing that they were unconstitutional must be made to appear in order to overcome the presumption.[2] The evidence in the instant case is devoid of such particulars. There is no testimony to show that the search of petitioner's home was an exploratory ransacking of his papers, records, and effects for evidence of crime in general, as in *United States* v. *Lefkowitz*, 285 U. S. 452, and *Go-Bart Company* v. *United States*, 282 U. S. 344. Neither is there testimony that it was made without an arrest warrant and in the absence of the accused, as in *Taylor* v. *United States*, 286 U. S. 1, *Amos* v. *United States*, 255 U. S. 313, and *Weeks* v. *United States*, 232 U. S. 383; there is testimony to the contrary (R. 7, 10, 13). The search and seizure were not made in premises other than that of the arrest and after the arrest had been made, as in *Agnello* v. *United States*, 269 U. S. 20, nor were they made to seize private papers of the accused, as in *Gouled* v. *United States*, 255 U. S. 298. They were not conducted ostensibly under a state search warrant to seize matter made contraband only by federal law, as in *Byars* v. *United States*, 273 U. S. 28, nor after entrance was gained to the accused's dwelling without a search or arrest warrant and without the consent of the accused, as in *Dukes* v. *United States*, 275 Fed. 142 (C. C. A. 4). In fact, the

[2] *Samson* v. *United States*, 26 F. (2d) 769,770 (C. C. A. 1); *United States* v. *Fitzmaurice*, 45 F. (2d) 133, 135 (C. C. A. 2); *Schnitzer* v. *United States*, 77 F. (2d) 233, 235 (C. C. A. 8).

most that can be gathered from the evidence is that petitioner's pistol was seized and his premises searched. Clearly, therefore, the presumption of the legality of the agents' conduct in seizing the pistol and searching the premises was not overcome by any evidence calculated to prove the search and seizure to be unconstitutional under the rule of the cases cited above and relied upon by petitioner (Pet. 10). Indeed, the evidence warrants the inference that the seizure of the pistol was a legal seizure of an instrument which petitioner could have used to attempt an escape [3] and that the search was a legal search of the place of arrest for the fruits and instrumentalities of the crime [4] for which the arrest was made.[5]

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[3] As an incident of a lawful arrest, officers may search the person of the prisoner and the vicinity of the arrest for instruments with which an escape could be attempted. See *Agnelie* v. *United States*, 269 U. S. 20, 30; *Toliver* v. *State*, 133 Miss. 789, 794–795; *Smith* v. *State*, 52 Okla. Cr. 315, 317; *State* v. *Pinto*, 312 Mo. 99, 107. See also notes, *Right of Search and Seizure Incident to Lawful Arrest, Without a Search Warrant*, 32 A. L. R. 680, 51 A. L. R. 424, 74 A. L. R. 1387, 82 A. L. R. 782.

[4] The warrant of arrest charged petitioner with aiding and abetting a theft of cigarettes (R. 34), commodities easily concealable in a dwelling.

[5] As an incident of a lawful arrest, officers may search the person and vicinity of the arrest for fruits and instrumentalities of the crime for which the arrest was made. See *Agnello* v. *United States*, *supra*, at 30; *Weeks* v. *United States*, 232 U. S. 383, 392; *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 203–204 (C. C. A. 2); *Appell* v. *United States*, 29 F. (2d) 279, 280 (C. C. A. 5); *Shelton* v. *United States*,

Accordingly, certiorari should not be granted on this question.

II

Petitioner contends that the circuit court of appeals erred in resorting to the legislative history of the Federal Firearms Act to determine the meaning of the term "firearm" as defined in Section 1 (3) of the Act (Pet. 11–12); he does not contend that the court's construction of the section is erroneous if resort to the legislative history is proper.

Section 1 (3) defines a "firearm" as "* * * any weapon * * * which is designed to expel a projectile * * * by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon." Petitioner impliedly argues that this definition describes a firearm as a weapon which expels a projectile through the action of an explosive and a silencer,[6] and that it does not cover his pistol since it was neither equipped with a silencer nor in condition to have one attached at the time it was seized by the agents.[7] He argues further that since the defini-

50 F. (2d) 405, 407 (C. C. A. 7); *Occinto* v. *United States*, 54 F. (2d) 351, 352 (C. C. A. 8).

[6] There is no difference between a "firearm muffler" and a "firearm silencer." See testimony of Baughman (R. 79); The Columbia Encyclopedia, "Silencer," p. 1630; Webster's New International Dictionary (2d ed., 1936), "Muffler," p. 1607.

[7] Petitioner's conclusion is unsound even on his premise. His premise is that the definition of firearm limits that term

tion is plain and unambiguous, it was error for the circuit court of appeals to resort to the legislative history of the section to find a meaning which included his pistol.

Petitioner's construction of the definition is that a "firearm" is an instrument which expels a projectile by action of an explosive and a silencer. This construction is not consistent with the known characteristics of firearms. A firearm expels a projectile, not by the action of the explosive used therein *and* the action of a silencer, but solely through the propulsive action of the explosive, the only purpose and function of a silencer being to lessen the report which follows the shooting of the firearm by retarding the escape of gases released upon the ignition of the explosive.[7] Under petitioner's construction the statute defines a firearm as being something which does not exist. So

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to an instrument which operates through a combination of an explosive and something else. Petitioner assumes that the latter element of the combination can only be a firearm muffler or silencer, but the statute says "and a firearm muffler or firearm silencer, or any part or parts of such weapon." Since a muffler or silencer is not a weapon, the "parts" referred to are those of a weapon "designed to expel a projectile." Thus the pistol here was a "firearm", even if the statute as petitioner contends requires a combination of elements, since it operated by the combined action of an explosive and its own parts.

[7] See testimony of Baughman (R. 79, 80); 15 Encyclopaedia Britannica (14th ed., 1936), "Maxim Silencer," p. 118; The Columbia Encyclopedia, *op cit.*, note 6, *supra;* Webster's New International Dictionary (2d ed., 1936), "Silencer," p. 2336.

construed, the statute cannot accomplish the legislative purpose which plainly appears from the face of the statute, to prohibit fugitives from justice and persons under indictment for crimes of violence, or who have been convicted of such crimes, from shipping, transporting, or receiving in interstate commerce any firearm or ammunition. Petitioner's construction of Section 1 (3) thus renders the statute nugatory and in such circumstances reference may be made to its legislative history,[9] even though it is part of a criminal statute.[10]

Accordingly, certiorari should not be granted on this question.

III

Petitioner further contends (Pet. 13–14) that the Federal Firearms Act violates the Second Amendment. We submit, however, that he has no standing to challenge the Act as in contravention of that Amendment. The Amendment does not confer a right to keep and bear arms; it merely forbids the Congress from infringing any right to bear and keep arms secured to persons by the laws of the State in which they reside. *United States* v. *Cruikshank*, 92 U. S. 542, 553; *Presser* v. *Illinois*, 116 U. S. 252, 265. Petitioner, however, cannot show that the State of

[9] *United States* v. *American Trucking Associations*, 310 U. S. 534, 542–544, 546; *United States* v. *Dickerson*, 310 U. S. 554, 561–562.

[10] *United States* v. *Raynor*, 302 U. S. 540, 543.

New Jersey, in which he has lived since 1921 (R. 33), confers upon him a right to bear and keep a pistol, for the laws of that State make it a crime for a person convicted of burglary to possess such a weapon. N. J. Rev. Stat. (1937), Sec. 2: 176–8. Therefore, he cannot bring himself within the protection of the Second Amendment, and consequently has no standing to argue that the Act contravenes that Amendment. *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576.

Moreover, as the circuit court of appeals pointed out (R. 99), petitioner failed to show that his pistol was of a type which "has some reasonable relationship to the preservation or efficiency of a well regulated militia" (see *United States* v. *Miller*, 307 U. S. 174, 178). Having failed to show that he is within the possible scope of the Second Amendment, petitioner is not in a position to urge its inconsistency with the statute under which he was convicted.

Finally, as the court below held (R. 100), the right to bear arms by its very nature cannot be absolute. Some limitation on it is inevitable, and the instant statute is a reasonable limitation, well within the perimeter of Congressional power. The decision below is correct and is not in conflict with any other decision interpreting the Second Amendment.

Accordingly, certiorari should not be granted on this question.

IV AND V

We believe, and intend to argue if certiorari is granted, that the circuit court of appeals did not err in holding that the presumption provided in Section 2 (f) of the Act is constitutional and that it remains in the case after the defendant puts in contradicting evidence, subject to the qualification that it must be disregarded by the jury if they find the defendant's evidence credible. However, the court's ruling on the constitutionality of the presumption, while supported by the decision of the First Circuit in *Jose Velazquez* v. *United States*, decided November 27, 1942, is in conflict with the decision of the Sixth Circuit in *William Minski* v. *United States* and *Frank Delia* v. *United States*, both decided in the same opinion on December 2, 1942. The Government intends to file a petition for writs of certiorari in the *Minski* and *Delia* cases, and we are advised that a petition will also be filed by the appellant in the *Velazquez* case. Moreover, we believe that the question whether—and if so, under what circumstances—a statutory presumption is taken from the jury's consideration when the defendant puts in rebutting evidence is in some doubt under the decisions of this Court. Cf. *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642–644, *Atlantic Coast Line* v. *Ford*, 287 U. S. 502, 506, and *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 170, 171, with *Hawes* v.

Georgia, 258 U. S. 1, 5, and *Casey* v. *United States*, 276 U. S. 413, 418. We do not, therefore, oppose the instant petition in so far as it seeks review of these two questions.[11]

CONCLUSION

The first three questions raised by petitioner were correctly decided below, there is no conflict of decisions as to them, and they raise no question of general importance. We submit, therefore, that the petition for a writ of certiorari should be denied as to them. However, we do not, for the reasons stated above, oppose the granting of the petition on the two remaining questions.

Respectfully submitted.

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JANUARY 1943.

[11] There is a further question presented by the record in this case which the court below did not consider, that is, whether it is a violation of the statute to receive a firearm which has at *any time* been shipped or transported in interstate commerce. The language of the statute is not limited in point of time; it interdicts the receipt of "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In the instant case there is un-

APPENDIX

The Second Amendment to the Constitution of the United States provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The pertinent part of the Fifth Amendment provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

---

controverted evidence that petitioner's pistol was shipped in interstate commerce in 1919 and at some indefinite subsequent date (*supra*, p. 4). Hence, if the statute applies to the receipt of a firearm which had at any time been shipped or transported in interstate or foreign commerce it is unnecessary to rely upon the presumption to establish such transportation. However, since the Government adduced no proof as to the date petitioner received the pistol, reliance must be had upon the presumption insofar as his receipt of the pistol after the effective date of the statute is concerned.

Sections 1 (3), 1 (6), and 2 (f) of the Federal Firearms Act of 1938, 52 Stat. 1250, 15 U. S. C. 901 (3), 901 (6), and 902 (f) provide:

> SEC. 1 (3). The term "firearm" means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.
>
> * * * * *
>
> SEC. 1 (6). The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.
>
> * * * * *
>
> SEC. 2 (f). It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive (*sic*) from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1942

FRANK TOT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 74–91) is reported in 131 F. (2d) 261. The opinion of the district court on demurrer to the indictment (R. 51–53) is reported in 36 F. Supp. 273. The opinion of the district court on two trial motions, a reserved motion to dismiss and a motion for new trial (R. 53–62), is reported in 42 F. Supp. 252.[1]

[1] An opinion of the district court on petition for suppression of evidence in connection with a superseded indictment (R. 46–50), is reported in 28 F. Supp. 900.

JURISDICTION

The judgment of the circuit court of appeals was entered October 28, 1942 (R. 92). The writ of certiorari was granted January 11, 1943 (R. 93). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the presumption clause of section 2 (f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

2. Whether the presumption was rebutted so as to require the direction of a verdict, by uncontradicted but impeached defense testimony which the trial judge anticipated the jury might not believe.[2]

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 2 (f) of the Federal Firearms Act of 1933, 52 Stat. 1250, 1251, 15 U. S. C. Section 902 (f), in pertinent part provides as follows:

> It shall be unlawful for any person who has been convicted of a crime of violence

[2] The court's order granting certiorari limited the scope of review to the last two questions stated in the Government's memorandum on the petition for certiorari (R. 93).

> * * * to receive any firearm * * * which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.[3]

STATEMENT

Petitioner was convicted after jury trial in the District Court for the District of New Jersey under an indictment in one count, alleging a violation of Section 2 (f) of the Federal Firearms Act of 1938 (R. 54). The indictment alleged that petitioner, having been previously convicted of two crimes of violence, a burglary and an assault and battery with intent to beat, wound, and ill-treat,[4] did on or about September 20, 1938, at Newark, New Jersey, "knowingly, unlawfully and feloniously receive a certain firearm, towit, a thirty-two calibre Colt automatic pistol, which said pistol had been shipped and transported in interstate commerce to the said City of Newark from a place to the Grand Jurors unknown" (R. 34). Petitioner was sentenced to two years' imprisonment (R. 2). On appeal to the Circuit

[3] The Act is set out in full in the Appendix to the Government's brief in a companion case, *United States* v. *Frank Delia*, No. 636, p. 50, *et seq.*

[4] Petitioner does not question that these crimes are "crimes of violence" under the definition of Section 1 (6) of the Act.

Court of Appeals for the Third Circuit, the judgment was affirmed (R. 92).

The evidence material to the questions now presented was as follows:[5]

Petitioner Tot had been convicted of an assault and battery in 1925, and had pleaded *non vult* to a burglary in 1932, both in the state courts of New Jersey (R. 14–15, Gov. Ex. 5 original). On September 22, 1938, he was found in possession of a fully loaded .32-calibre Colt automatic pistol, in his home at Newark, New Jersey (R. 8, 9). On this evidence the Government rested its case in chief, and the petitioner's motion for directed verdict was denied (R. 19).

Petitioner took the stand in his own defense and testified that he had purchased the gun in New Jersey in 1933 or 1934[6] from "one of the unfortunates that's around the dump" (R. 27, 30) He admitted the criminal record already proved in the Government's case and also a liquor conviction, and on cross-examination he admitted that his criminal record included in addition the carrying of concealed weapons in 1925 (R. 28–30). His sister and his wife testified that from time to time since the date of his stated acquisition of the gun, they had seen him in possession of that same gun (R. 32, 34–35). On cross-examination, however,

[5] Evidence material only to questions on which the Court did not grant certiorari has been omitted.

[6] I. e., four or five years prior to July 30, 1938, the effective date of the Act. Section 8.

both the wife and sister admitted that they were not certain that the pistol which they had seen over the period testified to was the one in question, and the wife admitted that the pistol which she had seen might have been a different one (R. 32–34, 35–37). The wife admitted conviction of a crime, though she could not remember what crime it had been (R. 32).

The Government introduced no evidence to contradict the testimony of any of the defense witnesses, confining its rebuttal evidence to testimony from a representative of the manufacturer of the gun, that the gun had been made in Connecticut and in 1919 was shipped by the manufacturer to Chicago, Illinois (R. 37–38). Petitioner's motion for directed verdict at the end of the whole case was denied (R. 39), and the jury found petitioner guilty (R. 2). Details of the evidence will be stated in the Argument.

SUMMARY OF ARGUMENT

I. The question of the reasonableness of the provision of Section 2 (f) of the Federal Firearms Act, that possession of a firearm by a person who has been convicted of a crime of violence is presumptive evidence that he received it in interstate commerce after the effective date of the Act, is identical with that involved in the companion case of *United States* v. *Delia*, No. 636, and discussion in the instant brief is confined to demon-

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stration that the factual differences between the two cases are immaterial.

II. The presumption was not rebutted by the uncontradicted testimony of the defense witnesses, because that testimony was impeached and disbelieved. While no case in this Court appears to have dealt squarely with the question whether impeached uncontradicted testimony denying a presumed fact operates as a rebuttal of the presumption so as to demand the direction of a verdict against the presumption, the pattern of the federal criminal cases involving parallel presumptions under the narcotics statutes establishes that the mere utterance of testimony denying a presumption does not rebut it even in a criminal case. Moreover, this Court has consistently assumed that such testimony is insufficient to take the case away from the jury. From the viewpoint of the law of evidence, to regard impeached and disbelieved testimony as a rebuttal would encourage perjury by depriving the proponent of the benefit of cross-examination, and would defeat the purpose of the presumption, which is intended to produce the truth, not mere words. This is not to regard the presumption as evidence. This merely requires the production of evidence which on its own merits is sufficiently credible to create a reasonable doubt of guilt. It does not require or indeed permit that the presumption give impetus to any disbelief of the rebuttal evidence.

ARGUMENT

I

THE PRESUMPTION OF SECTION 2 (f) OF THE FEDERAL FIREARMS ACT IS NOT ARBITRARY OR UNREASONABLE

The identical question of validity of the presumption of Section 2 (f) of the Federal Firearms Act, as a matter of due process, is presented in the companion case of *United States* v. *Frank Delia*, No. 636, and the Government's position on the question has been stated in full in our brief in that case. We point out there that the presumption has two principal phases, the presumption that the possessor acquired the gun in a transaction across a state line, and the presumption that this acquisition took place after the effective date of the Act, July 30, 1938. In the *Delia* case, which arose in Michigan, we rested the validity of both presumptions in part upon the provisions of Michigan law, under which special difficulties have for years been placed in the way of intrastate acquisition of guns by men who have criminal records for crimes of violence. Petitioner Tot was found in possession of a gun in New Jersey (R. 5, 7). New Jersey law has comparable provisions, set out at pages 20–21, footnote 14, of our brief in the *Delia* case. Although the instant gun was found in Tot's possession in New Jersey in 1938, less than two months after the effective date of the statute and almost 19 years to the day after it had left the manufacturer's Connecticut plant,

Tot's greater opportunity for acquisition before instead of after the effective date of the statute is of no consequence, because, as we pointed out in the *Delia* case, the presumption of acquisition subsequent to the effective date of the statute need not rest upon actual probabilities concerning opportunity for acquisition but, among other things, upon the possessor's greater accessibility to proof of prior acquisition.

With respect to the possibility of unrecorded acquisition before 1938 not in violation of state law, the instant case differs from the *Delia* case only in immaterial detail. New Jersey law, as we indicated in our *Delia* brief at the point cited, is not as rigid as Michigan law in two respects: (1) it does not forbid an unrecorded intrastate gift; and (2) it lacks a requirement that guns be registered by the possessor, which permits the possibility of legitimate acquisition prior to 1927 (when the state gun law was passed) without official record. Nevertheless, petitioner is not in a position to assert either of these possible means of legitimate unrecorded acquisition as ground for complaint against the instant presumption of acquisition subsequent to July 30, 1938. The gun was, to be sure, made in 1919, but the petitioner having testified to intrastate acquisition by *purchase* no earlier than *1933* (R 27, 30, 38), he is in no position to raise such possibilities in aid of his claims.

II

THE STATUTORY PRESUMPTION WAS NOT REBUTTED

Petitioner asserts (Br. p. 11) that he was entitled to a directed verdict at the end of the whole case,[7] since the Government's case rested on the statutory presumption which he claims was rebutted by uncontradicted testimony of the defense witness. This testimony, however, was impeached, and we submit that the trial court correctly sent the case to the jury for evaluation of the credibility of the impeached defense. We set out first the facts of the impeachment and thereafter the legal considerations bearing on the propriety of the trial court's action.

A. The defense witnesses were impeached

Undoubtedly the testimony of petitioner himself, that he acquired the gun in New Jersey in 1933 or 1934 (R. 27, 30), would, if believed, have amounted to a complete rebuttal of the presumption, for it asserted intrastate acquisition several years before the Act become effective in 1938. As to time of acquisition, his testimony was paralleled by that of his sister and his wife, the wife identifying the evidence gun as having been kept by petitioner since 1934, in a coat in a wardrobe in

[7] In the court below petitioner also complained of the charge to the jury (R. 40–43), but the court held that the charge given was clear and helpful and preferable to the confusing charge requested by petitioner (R. 84–85).

their home, the very place where it was found on the date in 1938 alleged in the indictment (R. 8, 32), and the sister identifying the evidence gun as having been kept by petitioner for some time in a wardrobe in her home prior to 1934 (R. 34–35). Nor was any of this testimony contradicted. But it was impeached.

The trial court, in denying a motion to set aside the verdict, characterized the defense story as one to "test the credulity of the credulous" (Opinion, R. 60). This opinion is supported not only by the relative improbability of petitioner's story, but also by petitioner's attitude and demeanor on the stand, which the trial judge like the jury had an opportunity to witness. Some indication of petitioner's attitude and demeanor remains even in the cold record (R. 30). In addition, in response to carefully framed direct examination questions, petitioner purportedly made a frank disclosure of his criminal record, including a liquor offense in addition to the two crimes of violence proved as part of the Government's case in chief (R. 24–25). Later, however, when it became apparent from cross-examination questioning that the Government was prepared to prove an additional offense, the carrying of concealed weapons, he hastened to admit the offense and to attempt a mitigation of the effect which the admission had of showing the lack of frankness of his direct testimony, for he made the statement, which the record demonstrates to be false, that he

had already admitted it on direct examination (R. 28; cf. R. 24–25).

The cross-examination at this point further shows petitioner's evasiveness and unreliability as a witness. The prosecutor, as noted, obtained an admission from petitioner that in addition to his other convictions he had been convicted of carrying concealed weapons (R. 28). Immediately, the following colloquy occurred (R. 29):

> Q. Oh, well, let's get this straight. We have this conviction that we are talking about now carrying concealed weapons and you say you pleaded non vult to it?
>
> A. That's right.
>
> Q. Are you quite sure that you weren't tried on that?
>
> A. On what?
>
> Q. On this same charge that we are talking about.
>
> A. What charge is that?
>
> Q. The charge is carrying concealed weapons and convicted on it after a verdict of guilty.
>
> A. What charge is that?
>
> Q. The charge is carrying concealed weapons. I am sorry to have to keep you straight on all this, but ——
>
> A. When was that?
>
> Q. I am referring to a charge of carrying a concealed weapon and on which you were found guilty after a trial and a verdict of guilty on June 22, 1925, is that right?
>
> A. No, sir.

Q. That is not?

A. No, sir. I did not have a trial.

Q. You did not have a trial?

A. A jury trial if you mean that, I did not. I pleaded non vult for a Judge.

Q. And then if the official records of that court should show that you were tried by a Judge after a waiver of a trial by a petit jury, and that your application for trial by a Judge was granted, and that the Judge handed down a verdict of guilty after trial was moved, then the records of the court, if they so show, are in error?

A. Well, there was a party—he is not here now—the man that defended me, and he was at the trial.

Q. But at any rate, whether you are right or the records of the court are right, you were convicted on that charge of carrying a concealed weapon in 1925?

A. On circumstantial evidence.

Q. Oh, I thought you pleaded guilty.

A. Yes, because I was a young boy at the time.

Q. I thought you were worried about the circumstantial evidence.

A. After I found out later on in years, I knew what it was, all right, it was too late.

Petitioner's evasiveness and lack of frankness, his inconsistency, the improbability of his story of the acquisition of the gun, coupled with his distinguished criminal record, combined to cast grave doubt on his credibility and to justify the jury in its disbelief of his story.

The other defense witnesses were petitioner's wife and sister. Aside from the pull of family bias, the wife on cross-examination admitted a conviction but twice asserted that she could not remember of what she had been convicted (R. 32–33), a lapse of memory so amazing that neither trial court nor jury could be expected to place credence in her. Moreover, the confident corroboration which both women offered on direct examination, that petitioner had had the gun continuously from the time he testified he purchased it, broke down on cross, as the court below pointed out (R. 83–84). Both admitted that they did not know whether the evidence gun was the one they had seen in Tot's possession at the times they had seen a gun in his possession, nor even that the gun which they had so seen from time to time was always the same gun (R. 32–37). Such testimony falls far short of positively identifying the evidence gun as the one which Tot claimed to have purchased in 1933 or 1934, particularly in view of his record for the carrying of a concealed weapon back in 1925, already mentioned (R. 28–29): there was no reason for anyone to believe that the evidence gun had been his only gun.

B. *The trial judge properly denied the directed verdict and sent the case to the jury*

The trial judge properly refused to regard this impeached defense testimony as a rebuttal requiring him to direct a verdict for petitioner

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This testimony was not of the type which, even though as here uncontradicted by other evidence, the jury is required to believe.[8] Therefore, the question whether petitioner had rebutted the statutory presumption was for the jury to decide, for it depended entirely on whether the jury attached credence to the defense testimony.

While there are some state decisions which suggest the view[9] that any evidence, even that which the jury might disbelieve, is sufficient to rebut a presumption unsupported by parallel evidence, the expressions of this Court indicate that it has never adopted that view. This Court has stated the requirements of rebuttal of a presumption in terms of "clear, distinct and convincing proof", *Fresh* v. *Gilson*, 16 Pet. 327, 331; "ascertained and established facts", *Lincoln* v. *French*, 105 U. S. 614, 617; "substantial proof", *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 170. These expressions presuppose that normally whether an unsupported presumption has been rebutted is a

[8] See *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 216, stating and applying the rule that uncontradicted, testimony may not be disbelieved by the jury where it is *clear, candid* and *unimpeached*, and therefore may be made the basis for a directed verdict. Other cases are collected in McBaine, *Inferences: Are They Evidence?*, 31 Calif. L. Rev. 108, 110 (n. 14) December, 1942.

[9] For review of the cases, see Morgan, *Presumptions* (1937), 12 Wash. L. Rev. 255.

jury question.[10] And consistently with these expressions, in *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, this Court made plain that the mere introduction of rebuttal testimony does not make mandatory the direction of a verdict, when it said that a statutory presumption does not deny due process if it "does not shut out from the party affected a reasonable opportunity *to submit to the jury* in his defense all the facts bearing upon the issue." [Italics supplied.] Likewise, in the latest presumption case, *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 111, this Court said that the presumption requires the opponent "if he would avoid the inference, to go forward with evidence *sufficient to persuade* that the nonexistence of the fact, which would otherwise be inferred, is as probable as its existence", but that if the opponent "does go forward with evidence *enough to raise doubts* as to the validity of the inference, which the *trier of fact* is unable to resolve" [italics supplied], he is entitled to judgment notwithstanding the presumption. The references to the jury and to the trier of fact show unmistakably that this Court has believed

[10] In the *Gamer* case, there apparently was some evidence to support the presumption, but in holding that the presumption disappeared when rebutted by "substantial proof," the Court necessarily regarded the presumption, independently of the parallel evidence and therefore as if unsupported by any, as remaining effective until rebutted by "substantial proof."

that defenses to presumptions are to be evaluated by the jury or other trier of fact. Moreover, as we shall later show, in every case in which this Court has set aside trial judgments for improper treatment of the rebuttal, the impropriety has involved instructions given the jury for guidance in evaluating the rebuttal. The propriety of allowing the jury to evaluate the rebuttal has not been questioned.

Davis v. *United States*, 160 U. S. 469, the leading case in this Court on the quantum of evidence needed to overthrow a presumption in a criminal case, is wholly inconsistent with the theory that a presumption is overthrown by the mere introduction of contradicting evidence. There evidence had been introduced to rebut the presumption that the defendant was sane, and no evidence was introduced by the prosecution in support of the presumption. The question debated in the opinion of the Court was whether the defendant must rebut the presumption by a preponderance of the evidence or merely by creating a reasonable doubt. The Court chose the latter alternative. The underlying assumption of the decision is that the question is one for the jury to decide, though the only evidence for the jury to consider be evidence contradicting the presumption. It is a necessary conclusion that the jury can competently decide, in the face of such evidence, that the defendant is sane. The *Davis* decision was followed in *Matheson* v. *United States*, 227 U. S. 540.

Consequently, we submit that the court below properly concluded (R. 82) that the correct rule to be applied herein, within the limit on the burden of persuasion established for criminal cases in the *Davis* case, is that:

> It is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burde of Proof* (1920), 68 U. of P. L. Rev. 307, 315 n. 13.

When Congress enacted the statutory presumption herein involved, it could have found the foregoing indications of what this Court thought was required to rebut a presumption. Moreover, it could have found a series of decisions by circuit courts of appeals holding that under the Harrison Narcotics Act,[11] which contained a presumption arising from possession from which the presumption herein involved was copied, credible

[11] Internal Revenue Code, § 3224, Act of December 17, 1914, 38 Stat. 785, making possession of narcotics by an unregistered and untaxed person, other than within specified medical exemptions, "presumptive evidence" of unlawful trafficking. The 1919 amendment, Internal Revenue Code, § 2553, Act of February 24, 1919, 40 Stat. 1130, adds a prohibition of purchase, sale, dispensing, and distribution except in original stamped packages, and provides that the absence of appropriate tax-paid stamps shall be "prima facie evidence" of violation when the narcotics are found in the hands of an unregistered person.

evidence is needed to rebut the presumption and the credibility of the evidence is a jury question. *Davis* v. *United States*, 16 F. (2d) 778 (1927, C. C. A. 5); *Gowling* v. *United States*, 64 F. (2d) 796 (1933, C C. A. 6); *Stobble* v. *United States*, 91 F. (2d) 69 (1937, C. C. A. 7).[12] In view of the uniform pattern of federal decision and opinion to which Congress could have turned, the inference may fairly be drawn that when Congress enacted the instant statutory presumption it intended the presumption to have the effect given other presumptions in the foregoing decisions by this Court and the circuit courts of appeals. Cf. *Hecht* v. *Malley*, 265 U. S. 144, 153; *Latimer* v. *United States*, 223 U. S. 501, 504.

Since we are here dealing with a statutory presumption, the intention of Congress is controlling, so the inquiry should be directed toward determining what effect Congress intended the presumption to have. If the prosecution could normally produce evidence to contradict the rebuttal, to what point did Congress create the presumption itself? The rebuttal is not intended to be merely a pleading. The whole purpose of the presumption, corresponding to its primary justification under the

[12] Cf. *Ezzard* v. *United States*, 7 F. (2d) 808 (C. C. A. 8), a Harrison Act case, directing a verdict against the presumption because the uncontradicted rebutting evidence was "unimpeached." The court conceded that the presumption was not rebutted unless the evidence was credible, and agreed that normally the contradicting evidence must go to the jury. *Ibid*, 812. See footnote 8, *supra*.

due process clause, is to require that the defendant, as possessor of the truth, bring truth to light."[13] This consideration indicates that Congress intended the presumption to be the means of forcing the introduction by the defendant of credible evidence, of evidence which would justify the jury in having a reasonable doubt that the defendant was guilty, before the defendant could be acquitted.

Another reason to doubt that Congress intended the presumption to be without further effect once the defendant introduced contrary testimony, lies in the fact that such a rule would deprive the prosecution of all benefit of cross-examination. The instant case serves to illustrate that such would be the effect of the rule petitioner urges, because here the only evidence relating to the facts presumed by the presumption was the testimony on direct examination of petitioner, his wife and sister, and the impeaching testimony elicited from each on cross-examination. As both judge and jury disbelieved the defense testimony after it was impeached on cross-examination, the value of the cross-examination is clear. Yet it either should not have been allowed or should have been ignored, if petitioner's contention be sound.

The search for the truth would not be furthered by having the presumption satisfied by evidence

[13] See Bobbé, *The Uncontradicted Testimony of a Disinterested Witness* (1934), 20 Corn. L. Q. 33, suggesting that uncontradicted testimony be taken as true only if relating to matter within both parties' knowledge, and applying this to presumption rebuttal, *ib.*, 48–49.

which is disbelieved to the point where it does not create a reasonable doubt. As "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth" (*Funk v. United States*, 290 U. S. 371, 381)," the rule urged by petitioner should not be accepted.

Petitioner bases his contention on the familiar text-book formula that the function of a presumption is to compel the jury to reach a conclusion in the absence of evidence to the contrary, and if such evidence is "offered" or "introduced" the presumption "disappears." Wigmore, *Evidence* (3d ed. 1940) sec. 2491; 20 *Am. Jur.* 170, Evid. sec. 166. In support of his position he cites cases which contain general remarks to the effect that a presumption is rebutted when "uncontradicted" evidence "tending" to show the contrary of the facts presumed is "brought forward" or "introduced." Other cited cases say that a presumption must not "shift the burden of persuasion" or

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[11] Other decisions of this Court also emphasize that judicial trials are searches for the truth. Sham denials are disregarded (*Local 167 v. United States*, 291 U. S. 293). The trial judge may warn the jury of the danger of bias on the part of the defendant-witness (*Reagan v. United States*, 157 U. S. 301; *Johnson v. United States*, 157 U. S. 320). And a trial judge may authorize the jury to ignore the entire testimony of an incredible witness under the *falsus in uno* doctrine (*Allen v. United States*, 164 U. S. 492, 499–500). The trial judge gave an *Allen* charge in this case (R. 42), and a mild form of the *Reagan* charge in the *Delia* case (No. 636, R. 19).

"operate as evidence." Without exception, none of petitioner's cases holds what he needs to establish, i. e., that impeached testimony tending to rebut a presumption demands the direction of a verdict unless it is in turn met by contradictory testimony.

Alpine Forwarding Co. v. *Pa. R. R. Co.*, 60 F. (2d) 734 (C. C. A. 2), and *Essmeister* v. *Roadway Transit Co.*, 275 Mich. 387, 277 N. W. 391 (1936), are both cited by petitioner (Br. p. 9) in support of the proposition that the mere introduction of contrary evidence dissipates a presumption, the *Essmeister* case presumably for its dictum that the rebuttal occurs "when the evidence is introduced from which the facts can be found," (277 N. W. at 392), the *Alpine* case presumably for its reference to "substantial" evidence (60 F. (2d) at 736) as sufficient to rebut. But both cases dealt with the type of presumption which, if not rebutted, results in the direction of a verdict for the proponent and if rebutted raises a jury question. Applied to a criminal proceeding, where a verdict can of course never be directed for the prosecution, such cases at most establish a defendant's right to go to the jury, which is just what the trial court granted here.

Others of petitioner's cases (*Carroll* v. *Prudential Ins. Co.*, 125 N. J. L. 397, 15 Atl. (2d) 810 (1940); *Hoffman* v. *Lasseff*, 110 N. J. L. 122, 164

Atl. 293 (1932); *Caswell* v. *Maplewood Garage*, 84 N. H. 241, 149 Atl. 746 (1930); *Dunn* v. *Goldman*, 111 N. J. L. 249, 168 Atl. 299 (1933); *Connecticut Mutual Life Ins. Co* v. *Lanahan*, 112 F. (2d) 375 (C. C. A. 6); *Rhodes* v. *Pennsylvania R. R. Co.*, 298 Pa. 101, 147 Atl. 154 (1929); and *E. S. Company* v. *Rocheleau*, 52 R. I. 378, 161 Atl. 145 (1932)), involve uncontradicted evidence of a type which the jury is always required to believe.[15] They all held it proper to direct a verdict against the proponent of a presumption on clear, candid, unimpeached and uncontradicted rebuttal testimony. Thus in the *Carroll* case the court characterized the rebutting evidence as "clear and definite" and commented that "from a consideration of all the testimony a reasonable man could reach only one conclusion." In the *Hoffman* case the court noted that the cross-examination of the rebutting witnesses was unsuccessful, and in the *Caswell* and *Dunn* cases there was no showing of any cross-examination whatsoever, indeed the rebutting testimony in the latter case was commended as "plenary." Similarly, in the *Lanahan* case there was no question of credibility and the court commented that "all of the physical facts point unerringly" to the rebuttal of the presumption. The same is true of the *Rhodes* case, where the rebuttal testimony was treated as "established

[15] See footnotes 8 and 12.

facts," "facts clearly proven," "uncontrovertibly proven facts," and of the *E. S. Company* case, where there was no cross-examination and the defense testimony was noted to be "consistent and reasonable." None of these cases thus raised the present issue of defense credibility, for they did not pass on the possibility, actualized in the instant case, that an uncontradicted rebuttal might nevertheless be impeached and disbelieved.

One of the two cases most strongly relied on by petitioner, *McIver* v. *Schwartz*, 50 R. I. 68, 145 Atl. 101 (1929), not only does not support petitioner's contention that he was entitled to a directed verdict, but more important, it illustrates the inevitable compromises to which attempted adherence to petitioner's rule will lead a court. Rhode Island appears to be a state where the courts attempt to follow petitioner's rule, yet in *McIver* v. *Schwartz*, an automobile accident case where the plaintiff relied on the presumption that the driver had the defendant's authorization, the trial judge did not believe the defendant's rebutting testimony and refused to direct a verdict for the defendant. The jury also disbelieved the defendant and returned a verdict for the plaintiff. The state supreme court was apparently of the view that normally a verdict should have been directed for the defendant. But it was unable, in the face of the fact that neither the judge nor the jury had believed the defendant's rebuttal, to conclude that the defendant was entitled to a

directed verdict.[16] Yet it ordered a new trial. The ordering of a new trial does not meet the issue, since its only effect is to give the defendant an opportunity to retell his story, and if the second telling is no more convincing that the first, what is the next step? *McIver* v. *Schwartz*[17] is well known and discredited. In *O'Dea* v. *Amodeo,* 118 Conn. 58, 170 Atl. 456 (1934), it was reviewed and rejected, and a trial court order setting a verdict aside on comparable facts was reversed.[18] See Morgan, *Instructing the Jury on Presumptions and Burden of Proof,* 47 Harv. L. Rev. 59, 78–81, criticizing the *McIver* rule as incentive to perjury; and for criticism on doctrinal grounds see Morgan, *Some Observations Concerning Presumptions,* 44 Harv. L. Rev. 906, 912–913, 918–919.

It is unnecessary to enter into detailed discussion of the other state court cases cited by

[16] The court's language was emphatic: "A trial justice should not direct a verdict on testimony which he does not believe" (50 R. I., at 70).

[17] *Normandin* v. *Parenteau* (R. I.), 150 Atl. 460 (1930), also relied on by petitioner, is a *per curiam* decision, not officially reported, by the same state court. It held it proper for a trial judge to set aside the jury verdict for a plaintiff who had relied on a presumption but had herself given testimony tending to rebut the presumption.

[18] For similar emphasis on the need for credible rebutting testimony, see *Chaika* v. *Vandenberg,* 252 N. Y. 101, 169 N. E. 103 (1929); *Andrew Jergens Co.* v. *Connor,* 125 F. (2d) 686, 689 (C. C. A. 6); *Tschudi* v. *Mutual Life Insurance Co.,* 72 F. (2d) 306 (C. C. A. 8). See also *Luria* v. *United States,* 231 U. S. 9, 19.

petitioner on the matter of rebuttal, since none of them deal with uncontradicted rebuttal or the direction of a verdict against a presumption, nor do they even contain discussion of those subjects.[19] They are of interest only as enunciating the standard doctrines that a presumption is not evidence, and must not shift the burden of persuasion. With such cases, it must be apparent, we need have no dispute even as to language. Although, as Mr. Justice Black has pointed out in his dissent in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 172, 175–177, refusal to allow a presumption to operate as evidence or to shift the burden of persuasion may invite a rule of law giving the trial judge power to direct a verdict,[20] we need not in this case deny that it is proper for the trial judge to direct a verdict in the face of a presumption where the rebutting evidence is

[19] This applies to petitioner's citation of *Tyrell* v. *Prudential Ins. Co.*, 109 Vt. 6, 192 Atl. 184 (1937); *Minutilla* v. *Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884 (1929); *Walters* v. *Western, etc., Life Ins. Co.*, 318 Pa. 382, 178 Atl. 499 (1935); *Kelly* v. *Hudson Coal Co.*, 119 Pa. Super. 405, 179 Atl. 753 (1935); and *Domanowski* v. *Prudential Ins. Co.*, 116 N. J. L. 247, 182 Atl. 906 (1936). *Podolsky* v. *Sautter*, 102 N. J. L. 598, 133 Atl. 199 (1926), appears to be a routine automobile accident appeal, with no presumption question or presumption language.

[20] The doctrine of "disappearing presumptions," as Mr. Justice Black termed it in the *Gamer* case, traces to a passage in Thayer, *Preliminary Treatise on Evidence* (1898), 346. But Thayer does not treat the problem of sending the case to the jury, but deals with trial rulings excluding, or charges minimizing, the rebuttal evidence.

clear, candid, and unimpeached, as in petitioner's cases discussed above, pp. 21–23, and in *Ezzard* v. *United States,* 7 F. (2d) 808, *supra,* note 12. Questions of burden of persuasion and the doctrine that a presumption is not evidence, as the very phrases connote, are of importance only in cases like *Davis* v. *United States,* 160 U. S. 469, *supra,* and the *Gamer* case itself, as problems of instructing the jury, since it is the jury which must weigh evidence and be persuaded. Such problems do not arise until the case passes beyond the stage of motion for directed verdict, which is the stage involved here because the trial judge sent the case to the jury for evaluation of a defense which he himself thought incredible.

The cases in which this Court has turned decision upon the doctrine that a presumption must not operate as evidence or shift the burden of persuasion have been cases of erroneous instructions to the jury. These have been cases where circumstantial evidence was offered, to rebut the presumption that death was accidental and not suicide (*Del Vecchio* v. *Bowers,* 296 U. S. 280; *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161) or to rebut a statutory presumption of negligence (*Western & Atlantic Railroad* v. *Henderson,*[21]

[21] In the *Western & Atlantic Railroad* case this Court declared unconstitutional a state statute creating a presumption, because the state courts had construed the presumption as having the status of evidence. As the presumption herein is not evidence, the case has no relevance.

279 U. S. 639). In such situations no eyewitness testifies to the ultimate fact of accident or suicide, negligence or due care. The jury's task is a very difficult one of weighing against one another the competing circumstantial inferences from the facts actually proved by both parties. To avoid unfairness it may be important that the charge not permit the inference embodied in the presumption to retain, for purposes of the jury's evaluation of the defense, any of the "artificial" (*Yee Hem* v. *United States,* 268 U. S. 178, 185) increment of weight beyond its inherent probative force, which it had for procedural purposes. This is because a presumption which is evidence may have as much weight as the jury wants to give it and hence may become, in the jury's discretion, for practical purposes irrebuttable. A conclusion that Congress did not intend the statute herein to create a presumption with such effect is not equivalent to a conclusion that the presumption is overcome by evidence which, weighed alone independently of any impetus from the presumption, the jury finds incredible.

The proper procedural effect of the presumption at this point in the trial is that on submission of the whole case to the jury the presumption "remains in abeyance pending the jury's reaching this preliminary decision as to the credence to be given the evidence on this particular point." (*Gillett* v. *Michigan United Traction Co.,* 205

Mich. 410, 421, 171 N. W. 536 (1919), an admirable discussion of what we conceive to be the correct rule). If the jury believes that the rebutting evidence has credibility, the coercive effect of the presumption is terminated, and unless distorted by an incorrect charge it retains as against the rebutting evidence only such effect as any inherent probability of the circumstantial inference which it embodies would have in the absence of the statutory presumption. Further, an affirmative distortion by the charge, and not a mere ambiguity in the charge, is prerequisite to a claim that there has occurred a shifting of the burden of persuasion or a treatment of the presumption as evidence. *Atlantic Coast Line* v. *Ford*, 287 U. S. 502, 507.

Since the defense here turned on a specific denial by petitioner himself, the case stood or fell on the credibility of his denial, not on the probability of the inference embodied in the presumption, be that probablity great or small. The charge is not here under attack, but it will be noted that it was standard on reasonable doubt (R. 40, 41) and was so detailed on credibility (R. 41–42) that it could not have failed to make clear to the jury that credibility was the only issue in the case. If the jury found petitioner worthy of belief or indeed even if they could not make up their minds whether or not to believe him, they were thus charged to

acquit him,[22] and they were not asked to balance off the probability of actual receipt from out of the state subsequent to the Act against the probability that petitioner was the sort of person they could believe. And on the other hand, even if they felt that the inference embodied in the presumption was most improbable, they could still properly convict if they had no confidence at all in the defense witnesses or in the particular story which the defense chose to tell, for the failure of his defense left petitioner "as though he stood mute facing the presumption." *Tomkins Cove Stone Co.* v. *Bleakley Transportation Co.*, 40 F. (2d) 249, 251 (C. C. A. 3). Petitioner, in short, has simply failed to "go forward with evidence enough to raise doubts as to the validity of the inference," *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 111.

The foregoing discussion shows the misapprehension which has caused petitioner to contend that the decisions below conflict with the due process clause on the ground that they deprive him of a fair opportunity to rebut the presumption. As we have seen, they allow him the unrestricted opportunity to rebut the presumption by

[22] In accord with *Davis* v. *United States*, 160 U. S. 469, and *Matheson* v. *United States*, 227 U. S. 540, dealing with the charge on the rebuttal of the so-called presumption of sanity in federal criminal cases, and discussed above, p. 16.

evidence which on its own merits the jury finds sufficiently credible to create a reasonable doubt of his guilt. Moreover, as the court below noted (R. 84), this Court has sustained against similar attack other presumption statutes imposing on the rebuttal far more onerous restrictions than any imaginable here. For instance, in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729, a provision of the old Chinese exclusion law was upheld which forbade even the introduction of testimony to rebut the presumption of nonresidence unless that testimony was that of a "credible white witness." This restriction precluded resort to the ordinarily available sources of rebuttal testimony. A further example is *Hawes* v. *Georgia*, 258 U. S. 1, where a Georgia statute was upheld which presumed knowledge of an illicit still from occupation of the tract of land upon which the still was located, although under the governing Georgia procedure the defendant could not testify on his own behalf under oath, and his wife could not testify for him at all.

Because neither the statute nor the decisions below accord the presumption the status of evidence, any effect of *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639 (compare *Ferry* v. *Ramsey*, 277 U. S. 88), as a restriction on legislative power need not be considered.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

Nos. 569, 636.—October Term, 1942.

Frank Tot, Petitioner, 569 *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
The United States of America, Petitioner, 636 *vs.* Frank Delia.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[June 7, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases involve the construction and validity of §2(f) of the Federal Firearms Act,[1] which is:

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

In No. 569, Tot, the petitioner, was convicted[2] upon an indictment which charged that he, having been previously convicted of two crimes of violence, a burglary and an assault and battery, with intent to beat, wound, and ill-treat,[3] on or about September 20, 1938, at Newark, New Jersey, knowingly, unlawfully, and feloniously received a described firearm which "had been shipped and transported in interstate commerce to the said City of Newark." The Circuit Court of Appeals affirmed the judgment.[4]

[1] c. 850, 52 Stat. 1250, 1251; 15 U. S. C. § 902(f).

[2] See 42 F. Supp. 252.

[3] These are crimes of violence according to the definition contained in § 1(6) of the Act 15 U. S. C. § 901(6).

[4] 131 F. 2d 261.

The Government's evidence was that Tot had been convicted of assault and battery in 1925, and had pleaded *non vult* to a charge of burglary in 1932 in state courts, and that, on September 22, 1938, he was found in possession of a loaded automatic pistol.

After denial of a motion for a directed verdict, Tot took the stand and testified that he purchased the pistol in 1933 or 1934. He admitted the criminal record charged in the indictment and other convictions. His sister and his wife testified in corroboration of his evidence, but their testimony was shaken on cross-examination. In rebuttal the Government produced a representative of the manufacturer who testified that the pistol had been made in Connecticut in 1919 and shipped by the maker to Chicago, Illinois. At the close of the case petitioner renewed his motion for a directed verdict, which was denied.

In No. 636, Delia, the respondent, was convicted upon two counts. The first alleged that, on September 25, 1941, he was a person previously convicted of a crime of violence,—robbery while armed,[5] —and that he received and possessed a firearm, described in the indictment, "which firearm had theretofore been shipped and transported in interstate commerce." The second repeated the allegation of previous conviction and charged that, on September 25, 1941, he received and possessed certain cartridges which "had been theretofore shipped and transported in interstate commerce." The Government's proof was that Delia had been convicted of armed robbery and, on September 25, 1941, had in his possession a loaded revolver which had been manufactured in Massachusetts prior to 1920; that some of the cartridges in the pistol had been manufactured in Ohio and some in Germany, the former after 1934 and the latter at an unknown date. The respondent testified that he had, at about the time of his arrest, picked up the revolver when it was dropped by a person who attacked him, but there was testimony which tended to contradict this defense. The Circuit Court of Appeals reversed the conviction on each count.[6]

Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that

[5] Armed robbery is a crime of violence as defined in § 1(6) of the Act.
[6] 131 F. 2d 614.

this construction is correct. There remains for decision the question of the power of Congress to create the presumption which §2(f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute.

The Government argues that the presumption created by the statute meets the tests of due process heretofore laid down by this court. The defendants assert that it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant.

An indictment charges the defendant with action or failure to act contrary to the law's command. It does not constitute proof of the commission of the offense. Proof of some sort on the part of the prosecutor is requisite to a finding of guilt; it may consist of testimony of those who witnessed the defendant's conduct. Although the Government may be unable to produce testimony of eye witnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. In many circumstances courts hold that proof of the first fact furnishes a basis for inference of the existence of the second.[7]

The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States.[8] The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the

[7] Wilson v. United States, 162 U. S. 613, 619.

[8] Ex parte Fisk, 113 U. S. 713, 721; Adams v. New York, 192 U. S. 585, 599; Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 42; Bailey v. Alabama, 219 U. S. 219, 238; Luria v. United States, 231 U. S. 9; Hawes v. Georgia, 258 U. S. 1, 4.

existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.

The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.[9] This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case.[10] But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

The Government seeks to support the presumption by a showing that, in most states, laws forbid the acquisition of firearms without a record of the transaction or require registration of ownership. From these circumstances it is argued that mere possession tends strongly to indicate that acquisition must have been in an interstate transaction. But we think the conclusion does not rationally follow. Aside from the fact that a number of states have no such laws, there is no presumption that a firearm must have been lawfully acquired or that it was not transferred interstate prior to the adoption of state regulation. Even less basis exists for the inference from mere possession that acquisition occurred subsequent to the effective date of the statute, July 30, 1938. And, as no state laws or regulations are cited with respect to the acquisition of ammunition, there seems no reasonable ground for a presumption that its purchase or pro-

[9] Mobile J. & K. C. R. Co. v. Turnipseed, *supra*, p. 43; Bailey v. Alabama, *supra*, 239; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81; Luria v. United States, *supra*, 25; McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86; Manley v. Georgia, 279 U. S. 1; Western & A. R. Co. v. Henderson, 279 U. S. 639, 642; Morrison v. California, 291 U. S. 82, 90.

[10] Bailey v. Alabama, *supra*, 235.

curement was in interstate rather than in intrastate commerce.[11] It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience.

Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.[12]

Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision.

Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship.[13] Even if the presumption in question were in itself reasonable, we think that the nature

[11] Delia was convicted upon an indictment which charged, inter alia, receipt of ammunition.

[12] McFarland v. American Sugar Ref. Co., *supra*, 86.

[13] Morrison v. California, *supra*, 94, 96.

of the offense, and the elements which go to constitute it, render it impossible to sustain the statute, for the reason that one element of the offense is the prior conviction of a crime of violence. If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given.

Although the Government recognizes that the authorities cited in Note 9 announce the rule by which the validity of the Act is to be tested, it relies on certain other decisions as supporting the legislation. We think that what was decided in those cases was not a departure from the rule and that they are distinguishable from the instant cases.

In *Adams* v. *New York*, 192 U. S. 585, a state statute made it an offense "knowingly" to possess policy slips and provided that possession should be presumptive evidence "of possession thereof knowingly". The statutory presumption was sustained. Accidental and innocent possession of such a paper would be extraordinary and unusual and the statutory presumption was hardly needed to justify a jury in inferring knowledge of the character of the policy slip by one found in possession of it.

In *Hawes* v. *Georgia*, 258 U. S. 1, the statutory offense was that of knowingly permitting a still upon the defendant's premises. The statute provided that when distilling apparatus was found on the premises this should be *prima facie* evidence that the person in actual possession had knowledge of its existence. The defendant's premises were a farm on which a still was found. This court sustained the presumption. The inference so accorded with common experience that a statutory provision scarcely was necessary to shift the burden of proof.

In *Fong Yue Ting* v. *United States*, 149 U. S. 698, an Act of Congress was involved which required every Chinese alien within one year to procure from the Collector of Internal Revenue a certificate of residence and made it the duty of such alien to produce the certificate on request. Any officer was authorized to arrest a Chinese alien failing to produce the certificate on request and to hold him for deportation. The Act placed on the

alien the burden of proving at the deportation hearing his residence and of excusing his failure to procure a certificate. Failure to have in his possession the certificate the law required him to have gave rise to a natural inference of intentional failure to procure it or unlawful residence in the country which precluded his procuring it. In such a situation the shifting to the alien of the burden of explanation imposed no unreasonable hardship upon him.

In *Yee Hem* v. *United States*, 268 U. S. 178, it appeared that an Act of Congress prohibited importation of opium except under Treasury regulations and the latter forbade importation of smoking opium. The statute made it an offense knowingly to conceal opium illegally imported and threw upon a defendant found in possession of smoking opium the burden of showing that he had not acquired it through illegal importation. This court sustained the presumption on the ground that no lawful purchase of smoking opium could occur in this country and that, therefore, possession gave rise to sinister implications. It concluded it was not unreasonable to create a presumption of unlawful importation as the source of the commodity the possession of which the defendant concealed.

In *Casey* v. *United States*, 276 U. S. 413, the offenses created by Act of Congress were the purchase or sale of morphine from packages not stamped with an Internal Revenue tax stamp. The defendant was charged with a purchase from such a package. The evidence showed that he dispensed the drug in clandestine fashion and not from a stamped package. In these circumstances, this court held that the presumption created by the statute that a sale of morphine from an unstamped package should be *prima facie* evidence of a similar purchase was not unreasonable or beyond the realm of common experience.

The Government seeks to sustain the statute on an alternative ground. It urges that Congress, in view of the interstate commerce in firearms, might, in order to regulate it, have prohibited the possession of all firearms by persons heretofore convicted of crimes of violence; that, as the power of Congress extends so far, the presumption that acquisition was in interstate commerce is the lesser exertion of legislative power and may be upheld.[14] Two considerations render the argument inadmissible. First, it will not serve to sustain the presumption of acquisition after

[14] See Ferry v. Ramsay, 277 U. S. 88.

the effective date of the Act, and secondly, it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce.

The judgment in No. 569 is reversed and that in No. 636 is affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS concurs, concurring.

I agree that the mere possession of a pistol coupled with conviction of a prior crime is no evidence at all that the possessor of the pistol has acquired it in interstate commerce or obtained it since the effective date of the Act under consideration. The Act authorizes, and in effect constrains juries to convict defendants charged with violation of this statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense. The procedural safeguards found in the Constitution and in the Bill of Rights, *Chambers* v. *Florida*, 309 U. S. 227, 237, stand as a constitutional barrier against thus obtaining a conviction, *ibid.*, 235-238. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained.

It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 636

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 7, 1943
CERTIORARI GRANTED FEBRUARY 15, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 636

THE UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 In the District Court of the United States for the Eastern District of Michigan Southern Division

No. 26386

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DELIA, DEFENDANT

Docket entries

1942

Jan. 9. Indictment filed.
Jan. 9. Report of vote of Grand Jury, filed.
Jan. 9. Defendant arraigned, waives reading, will get attorney, pleads not guilty; remanded; Picard, J.
Jan. 17. Subpoena duces tecum to clerk of recorders court returned and filed.
Jan. 21. Appearance of defendant by Jack N. Tucker, attorney, filed.
Jan. 21. Motion to quash indictment, filed.
Jan. 21. Order denying motion to quash and dismiss indictment entered; Moinet, J.
Jan. 21. Jury trial begins; jurors impanelled and sworn.
Jan. 21. Defendant represented by Jack N. Tucker, attorney; witnesses sworn; continued to January 22, 1942; Moinet, J.
Jan. 22. Jury trial resumed; witnesses sworn; arguments of counsel; charge of court; verdict of jury; guilty as charged; sentence deferred to January 23, 1942; defendant remanded; Moinet, J.
2 Jan. 22. Plaintiff's request to charge, filed.
Jan. 22. Defendant's requests to charge, filed.
Jan. 23. Defendant sentenced to imprisonment on count 1, 5 years; count 2, to 5 years to run consecutively; Moinet, J.
Jan. 23. Commitment issued.
Jan. 26. U. S. Subpoena Robert Wood et al. and William Nesbit et al. returned and filed.
Jan. 27. Notice of appeal and grounds of appeal filed.
Jan. 31. Proof of service of notice of appeal, filed.
Feb. 4. Commitment returned and filed.
Mar. 12. Certified copy of application and order for extension of time to settle bill of exceptions and file assignment of errors to May 11, 1942; Simons, J.

1942

May 6. Appellant's assignments of error, filed.
May 6. Agreed statement of case on appeal, filed.
May 6. Designation of contents of record on appeal, filed.
May 6. Stipulation re comparison of record, filed.
May 11. Certified copy of order extending time to settle record on appeal: Hicks, C. J.
May 22. Agreed record on appeal filed.

In United States District Court

Assignments of error

Filed May 6, 1942

Now comes Frank Delia by Jack N. Tucker, his attorney, and says that in the proceedings herein and in the orders and judgment entered there are manifest errors, to wit:

1. The United States District Court erred in denying defendant's motions for directed verdict of not guilty made when the government closed its proofs and rested and also made when the defendant closed his proofs and before the case was submitted to the jury, for the following reasons:

a. There was no evidence that the revolver or ammunition allegedly in the possession of Frank Delia had been received by him in the course of interstate commerce or foreign commerce.

b. That the interval of time that elapsed between the shipment or transportation of the revolver or ammunition and the subsequent possession thereof by defendant was so long as to negative the commission of a crime under Title 15, Section 902, Subsection F of the Federal Code known as Federal Firearms Act.

c. There was no evidence from which the jury could find that Frank Delia knew that the revolver or ammunition allegedly in his possession had been previously shipped or transported in interstate or foreign commerce.

2. That the United States District Court erred in denying defendant's motions to quash the indictment and discharge the defendant because Title 15, Section 902, Subsection F of the Federal Code known as Federal Firearms Act, under which defendant was indicted and convicted is unconstitutional and void for the following reasons:

a. It violates Amendment Ten of the Constitution of the United States in that the Congress of the United States has legislated on a matter which is entirely within the power of the States to regulate. That said subsection is not a reasonable regulation of interstate commerce.

b. It violates Amendment Two of the Constitution of the United States in that it deprives the defendant of the right to keep and bear arms.

c. It violates Amendment Five of the Constitution of the United States in that it deprives the defendant of life, liberty and property without due process of law.

d. It violates Amendment Five of the Constitution of the United States in that it compels the defendant to be a witness against himself.

4 e. It violates Amendment Six of the Constitution of the United States in that it presumes one of the elements of the offense and deprives the defendant of the right to be confronted by witnesses against him.

JACK N. TUCKER.
Attorney for Appellant

In United States District Court

Notice of appeal

Filed January 27, 1942

Name and Address of Appellant: Frank Delia, County Jail, Detroit, Michigan.

Name and Address of Appellant's Attorney: Jack N. Tucker, 3220 Barlum Tower, Detroit, Michigan.

Offense: Violation of the Federal Firearms Act, Sec. 902 (f) Title 15 U. S. C.

Date of Judgment: January 23, 1942.

Brief description of judgment or sentence: Defendant sentenced to ten years in the Federal Penitentiary.

Name of prison where now confined (if not on bail): County Jail, Detroit, Michigan.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the Judgment above-mentioned on the grounds set forth below.

FRANK DELIA, *Appellant*

Dated: January 27, 1942.

GROUNDS OF APPEAL

(1) The District Judge erred in denying the motion to quash the indictment.

(2) The District Judge erred in refusing to grant the motion for directed verdict upon the completion of the Government's case.

(3) That Section 902 (f) Title 15 of U. S. C. of Federal Firearms Act is unconstitutional and void for the reason that:

(a) It violates Amendment V of the Constitution of the United States in that it compels the defendant to be a witness against himself.

(b) It violates Amendment V of the Constitution of the United States in that it deprives the defendant of life, liberty, and property without due process of law.

(c) It violates Amendment II of the Constitution of the United States in that it deprives the defendant of the right to keep and bear arms.

(d) It violates Amendment VI of the Constitution of the United States in that it presumes one of the elements of the offense and deprives the defendant of the right to be confronted by witnesses against him.

(e) It violates Amendment X of the Constitution of the United States in that the Congress of the United States has legislated on a matter which is entirely within the power of the State to regulate.

(f) It violates Amendment V of the Constitution of the United States in that it subjects the defendant to double jeopardy for the same offense.

(4) That the sentence of the court is excessive.

6 In United States District Court

Indictment

Violation: Sec. 902 (f) Title 15, U. S. C.
Federal Firearms Act.

United States of America

In the District Court of the United States for the Eastern District of Michigan, Southern Division

Of the November Term, A. D. 1941

Eastern District of Michigan,

Southern Division, ss:

The Grand Jurors of the United States of America, empaneled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That heretofore, to wit: on the 25th day of September A. D. 1941, at the City of Detroit, in the County of Wayne, in the Southern Division of the Eastern District of Michigan and within the juris-

diction of this Honorable Court, Frank Delia, late of the City of Detroit, State of Michigan, was a person who had been previously convicted of a crime of violence, to wit: a crime of robbery while armed, did unlawfully, wilfully, feloniously, and knowingly receive and possess a firearm, to wit: one Victor 38-caliber double action No. 19435, revolver, which firearm had theretofore been shipped and transported in interstate commerce: Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

COUNT II

And the Grand Jurors aforesaid, upon their like oaths, do further present: That heretofore, to wit: on the 25th day of September A. D. 1941, at the City of Detroit, in the County of Wayne, in the Southern Division of the Eastern District of Michigan and within the jurisdiction of this Honorable
7 Court, Frank Delia, late of the City of Detroit, Michigan, was a person who had been previously convicted of a crime of violence, to wit: a crime of robbery while armed, did unlawfully, wilfully, feloniously, and knowingly receive and possess two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce: Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN E. LEHR,
United States Attorney.
JOHN C. RAY,
Assistant United States Attorney,
Eastern District of Michigan.

This is a true bill.

JAMES W. JORDAN, *Foreman.*

In United States District Court

Motion to quash indictment

Filed January 21, 1942

Now comes Frank Delia, by Jack N. Tucker, his attorney, and moves to quash the indictment heretofore filed, and discharge the defendant for the following reasons:

1. That defendant is charged with the violation of Section 902, Subsection F of Title 15 United States Code of the Federal Firearms Act.

2. That Section 902, Subsection F of Title 15, United States Code of the Federal Firearms Act is unconstitutional and void for the reason that:

(a) It violates Amendment V of the Constitution of the United States in that it compels the defendant to be a witness against himself.

(b) It violates Amendment V of the Constitution of the United States in that it deprives the defendant of life, liberty and property without due process of law.

8 (c) It violates Amendment II of the Constitution of the United States in that it deprives the defendant of the right to keep and bear arms.

(d) It violates Amendment VI of the Constitution of the United States in that it presumes one of the elements of the offense and deprives the defendant of the right to be confronted by witnesses against him.

(e) It violates Amendment X of the Constitution of the United States in that the Congress of the United States has legislated on a matters which is entirely within the power of the State to regulate.

JACK N. TUCKER,
Attorney for Defendant.

Business Address: 3220 Barlum Tower, Detroit, Michigan.

In United States District Court

Agreed statement of case on appeal

Filed May 6, 1942

It is hereby agreed that the following statements set forth all of the evidence and proceedings in the District Court which are essential to a decision of the questions involved by the United States Circuit Court of Appeals.

1. The government introduced competent evidence that the defendant Frank Delia was convicted of robbery armed on October 4, 1930 in the Recorders Court for the City of Detroit in the case entitled "People of the State of Michigan v. Frank Delia," same being file No. 97181 in the said court, and was sentenced to twelve and one-half to twenty-five years in state prison.

2. That defendant did take the witness stand and testify that he had been attacked by several persons during which time the
9 revolver in question with the cartridges contained therein was dropped by one of his attackers unknown to him and that he, the defendant, had picked it up in self-defense and for his own protection and that he had not seen the gun nor possessed it prior thereto.

3. That the government introduced several witnesses who testified that the defendant did have in his possession on the 25th day of September 1941 at the City of Detroit, County of Wayne, Southern Division of the Eastern District of Michigan, one Victor thirty-eight caliber double action No. 19435 revolver containing two thirty-eight caliber Peters cartridges and three R. W. S. thirty-eight caliber cartridges and that they did not see any scuffle nor did they see the revolver dropped by anyone and picked up by Delia as he claimed.

4. That the testimony of Lieutenant James F. Payne set forth in the bill of exceptions constituted all of the testimony introduced by the government that said firearm and cartridges had been shipped, transported or received in interstate commerce.

5. That there was no testimony introduced by the government that defendant knew that the gun in question had been received, shipped, or transported in interstate commerce or that he had received, shipped, or transported said gun or ammunition in interstate commerce.

6. That prior to trial and at the close of the government's case and at the close of defendant's proofs counsel for defendant moved to quash the indictment and discharge the defendant on the grounds set forth therein and further moved for a directed verdict of not guilty on the ground that the government had not introduced sufficient evidence under which ..e could be found guilty by the jury. All motions were denied by the trial court.

JACK N. TUCKER,
Attorney for Appellant.

UNITED STATES OF AMERICA,
By JOHN C. RAY,
Assistant United States Attorney.

10 In United States District Court

**Transcript of testimony*

Opening statement

MR. RAY. Ladies and gentlemen, as the Court has already informed you, the defendant Frank Delia stands charged with pos-

session, with receiving and possessing a 38-calibre Victory double-action revolver on September 25, 1941, which revolver had previously been shipped in interstate commerce. That is the gist of the first count.

The second count charges that on the very same day, that is, September 25, 1941, Frank Delia, who was a person previously convicted of a crime of violence, namely, robbery while armed, did have in his possession, did receive and have in his possession five cartridges which had been theretofore shipped in interstate commerce.

The Government will produce a number of witnesses before you who will show that on October 4, 1930, the defendant herein, Frank Delia, was convicted in Recorder's Court of the City of Detroit on a charge of robbery while armed, and that he was sentenced to 12½ to 25 years in prison. Then we shall produce witnesses who will relate what happened on September 25th, and they will point out that at the foot of Shelby street, in the City of Detroit, on the afternoon of September 25 there was some disturbance at the D. & C. docks. That police officers arrived upon the scene, and that Frank Delia, the defendant, was there.

That Frank Delia was pointed out to the officers as possessing a revolver. That the officers gave chase to Frank Delia, together with quite a number of other persons, and that they caught up with Frank Delia in a parking lot on Wayne and West Jefferson in the City of Detroit.

That Frank Delia backed up against the wall, had a revolver in his possession, and, in fact, he used that revolver to keep the crowd away. And the testimony will show that the police
11 officer drew his own revolver and approached Frank Delia and took Delia's revolver away from him.

We will next show that this revolver and these cartridges came from outside of the State of Michigan and were shipped into the State of Michigan, were objects of interstate commerce. That is the gist of the offense charged in this case again Delia, and that is, of course, what the Government will set out to prove to you.

Thank you.

PAYNE, JAMES F., called as a witness on behalf of the Government, and having been first duly sworn by the clerk, testified as follows:

Direct examination (of Lieutenant Payne) by Mr. RAY:

Q. And what is your occupation, Mr. Payne?

A. I am chemist and fire arms expert for the Detroit Police Department.

Q. And how long have you been so employed?

A. It will be fourteen years at this particular job in April.

Q. And what is your rank with the Police Department?

A. Lieutenant.

Q. And during the course of your duties as a chemist and ammunition expert and gun expert for the Police Department—or rather withdraw that question. Will you explain to the jury just the nature of your duties?

A. All the fire arms that are picked up by the Department, that is, all revolvers, pistols, shotguns and rifles, are sent from the various stations where they are picked up to the laboratory. We fire test shots through those revolvers, pistols, or rifles and compare them with our fatal bullets that we have on file, some of them dating back ten and eleven years. Those are bullets that haven't been identified in a killing. That is a routine examination each day.

12 Q. And during the course of your duties in the past fourteen years have you had occasion to examine numerous revolvers?

A. To date I have had 20,196.

Q. And have you also had occasion to visit the various manufacturers of fire arms?

A. I have.

Q. Where fire arms are made?

A. I have.

Q. Witness, I show you Government's Exhibit No. 3 and ask you whether in your experience in the Police Department you have had occasion to examine that type of a gun [handing exhibit to witness]?

A. I have had numerous occasions to examine this particular type of weapon, or make of weapon, and this particular gun was brought to the laboratory on the 25th of September of last year. Our laboratory number is A-9649. That is 10,900—or 10,964.

Q. And you made your customary examination of that gun?

A. Yes. Test shots were fired.

Q. And do you know the make of the particular gun?

A. It was made by Harrington Richardson of Worcester, Massachusetts. This model 1900 is a Victor.

Q. You have had occasion to visit the Harrington Richardson plant in Worcester, Massachusetts?

A. Yes, in Worcester, Massachusetts. I was there for four days.

Q. Is that the only plant that the Harrington Richardson Company has?

A. That is the only one they have.

Q. Now, in your duties as an expert for the Police Department, you have also had occasion to examine various types of ammunition?

A. That is correct.

Q. And cartridges?

A. That is right.

Q. And you are familiar with various makes of cartridges?

A. I am.

13 Q. Their properties?

A. We have all makes that we can possibly get, because we use the various makes in our shootings. We have to match the ammunition used in the shooting. For that reason we have all types of ammunition procurable.

Q. That is, you also purchase ammunition yourself?

A. We do. That is right.

Q. Do you also in your examination of these cartridges have occasion to visit the manufacturers?

A. I have.

Q. And how many manufacturing plants have you had occasion to visit?

A. Winchester, Peters, and Remington.

Q. Now, I show you these two cartridges of Government's Exhibit 4 and ask you what make those cartridges are [handing exhibit to the witness]?

A. Those are Peter's cartridges. They are made by the Peters Cartridge Company at Kingsmill, Ohio. That is about thirty or thirty-five miles out of Cincinnati. They are .38 Police Positive cartridges.

Q. Had you occasion to visit that particular plant?

A. I did.

Q. Do you know whether that is the only plant that the Peters Cartridge Company had?

A. That is the only plant that they had. They were taken over here several years ago by Dupont, and now it is Remington & Peters, but these were made at Kingsmill, Ohio.

Q. Now, I show you these three cartridges, also a part of Government's Exhibit 4, and ask you whether you have seen that type of cartridge or cartridges before [handing exhibit to witness]?

A. Those are German-made cartridges. They are loaded with black or semismokeless powder.

Q. You have seen those previously?

A. Yes, we have those.

Q. On numerous occasions?

A. Yes, sir.

Q. They are not of domestic origin or manufacture?

A. No, no. They are made in Germany.

14 Q. Do you know the name of the manufacturer?

A. It is made just out of Berlin. Waldro-Greiner is the powder that is used in it, and they are made just outside of Berlin.

Q. And what caliber were these cartridges?

A. .38 Police Positive.

The Court. .38 what?

A. Police Positive.

Q. The same as these two Peters cartridges?

A. The only difference is the Peters cartridges are loaded with smokeless powder.

Q. Do you know, witness, whether there are any small fire arms manufacturers in the State of Michigan?

A. Not in the State of Michigan. The only company in the State of Michigan that made any arms at all was the Marble Game Getter that was made at Gladstone, Michigan, and that is outlawed through the new Federal law. They never made a revolver pistol. They made a single shot. It was both a shotgun and a .22.

Q. And are there any manufacturers of ammunition in the State of Michigan?

A. No, sir.

Q. So Exhibit 3 and Exhibit 4, Government's Exhibit 4 consisting of five cartridges, were manufactured outside of the State of Michigan?

A. That is correct.

Q. And in order to have reached the State of Michigan they would have to be shipped or transported in interstate commerce?

Mr. Tucker. I object to that, your Honor please. That is calling for this witness' conclusion.

The Court. Sustained.

Mr. Ray. That is all. Cross-examine.

Cross-examination by Mr. Tucker:

Q. Witness, I suppose in your experience with the Police Department you have seen thousands of cartridges similar to Exhibit 4?

A. We have.

15 Q. And you have seen many, many guns similar to Government's Exhibit 3?

A. In the last four or five years the big run of them is that type of gun.

Q. I see. And could you give us the names of some of the stores in Detroit that sell cartridges similar to Government's Exhibit 4, and guns similar to Government's Exhibit 3?

A. Which cartridge do you mean?

Q. Well, you can segregate them, if you will [handing exhibit to the witness]?

A. Those of Peters manufacture could be sold by any number of hardware stores in the City of Detroit that handle ammunition, like Lew Eppinger's, J. L. Hudson, Crowley-Milner, and any number of hardware stores, although they are not made in the state; and this German ammunition is not sold by any of the reputable dealers. It would be on the order of some of this bootleg stuff. They buy it at a cheap price and they are not reputable dealers who handle this. I couldn't name any reputable dealer that would sell this. A great part of this that comes into our state has come in from Colorado mail order houses, but is not sold any place that I know of in the State of Michigan.

Q. But they are sold in the State of Michigan and in Detroit through dealers who are not reputable?

A. Well, the big share of them are mail order houses. They are not, you know, put out in the regular manner like the average ammunition that you would go in and say, "I will take a box of Police Positive or .38 Special Colt"; at a reputable dealer you do not find any of that ammunition.

Q. Now, with reference to Government's Exhibit 3, which stores in the city sell that exhibit or a similar type?

A. Well, that type of a gun, the only way you would find that sold today would be in a second-hand condition, because that gun hasn't been made—well, I would say around 1920, it was made before 1920, and that particular model is known as model
16 1900, and it wasn't a satisfactory model as far as target shooting or police work was concerned, and it was discontinued and was not manufactured any longer.

Q. So that from your experience you say the last time this type of gun, Exhibit 3, was manufactured was around 1920?

A. Around 1920.

Q. Have you any idea as to the date when those cartridges were manufactured?

A. Well, those with the lacquer on the base around the primer, they put a lacquer around them, these Peters; they started putting that lacquer around about 1934. And these others, being of a damp primer, that is a different primer than is used in our regular ammunition. It is a foreign primer, entirely foreign, used by most foreign governments, but not used at all in the United States. I would have no way of telling, because they are loaded with black powder. Just when they were loaded I don't know.

Q. Well, could you give us any idea?

A. No.

Q. As to the time?

A. No. I say they are loaded with black powder, and that is foreign to what we load, and they are not loaded in the United States and the primers are entirely different. Therefore, I don't know. They may have been in here five years or maybe ten; I couldn't say.

Mr. TUCKER. That is all.

Re-direct examination by Mr. RAY:

Q. What do you mean by a reputable dealer, witness, in ammunition and guns?

A. Well, such as Lew Eppinger's, J. L. Hudson, Tagget Brothers, Peters Sport Shop, the Tool Shop, and Tipke, all well known dealers that advertise.

Q. That advertise and must comply with any particular requirements of the Police Department?

A. Well, when they sell guns or the like of that, they must send through the request and the gun has to be duly registered. Those particular companies or dealers we have no trouble at all with, because they comply with the law.

17

Q. During the course of your investigation of Government's Exhibit 3, had you occasion to check the registration on that?

A. I don't check that.

Q. You don't check that?

A. No, sir.

Q. But you say it is a type of a gun that would not be sold by reputable dealers?

A. No. It isn't a good gun, and the age of it, it would be sold as second-hand or along that line; but no reputable dealer would sell it because there is no demand for such a gun.

Q. By saying it is not serviceable, you mean that it was not serviceable for target purposes?

A. No. The sights on it are of little or no use, and there is no lock on the chamber. The chamber turns freely, and it is not a good gun for carrying, due to the fact that the cartridges can even roll out the sides where it is loaded, so they are not carried by any police officer.

Q. But the firing mechanism is otherwise intact?

A. Oh, it is in good working order.

Q. And it could discharge a cartridge?

A. That is right.

Q. One of those cartridges?

A. That is right.

Q. So the only source of procurement or of obtaining Exhibit 3 would be a second-hand dealer, is that right?

A. That would be the place you would buy it.

Q. And would those second-hand dealers have to comply with any police regulations?

A. Well, our dealers here do have to, but a number of guns that are found here come from the State of Ohio. They are bought down there like you would buy popcorn here.

Q. It is quite simple to obtain a revolver like that in Ohio?

A. Very easy.

18 Q. And their laws are easier than the State of Michigan?

A. You don't have to have a permit to buy or anything like you do here.

Q. Have you had occasion to trace any guns to Ohio?

A. Sir?

Q. Have you had occasion to trace any revolvers and guns to their sources in Ohio?

A. We have had a number of occasions on a number of killings. The guns were purchased in Ohio from second-hand dealers in pawn shops and the like of that.

Mr. RAY. That is all.

Re-cross examination by Mr. TUCKER:

Q. Well, around 1920, however, reputable dealers did handle this type of a gun?

A. Before the war—now, so it is understandable, prior to 1920 pistol shooting was at a very low ebb in this country, due to the fact that the guns that were made were not suitable to it. The United States Army had a .38 Colt D. A. known as the double action which was probably the first .38 gun that really was of any use. It was used in the Philippines and in through there and through that gun being accurate they started developing guns along that line. These were very common. I know in my home town they used to have one, this fellow. That is up here in the state, along that time.

Q. So along that time this type of gun, which is Government's Exhibit 3, was in common display in the State of Michigan?

A. Oh, it was, yes; that is right.

Q. There are ways of tracing guns, aren't there?

A. Well——

The COURT (interposing). Ways of what?

Q. Tracing guns?

A. (Continuing). You can, like Colt and Smith & Wesson. You send in the number and their records are very com-

19 plete. But Harrington and Richardson, who took over Hopkins & Allen and a number of those companies, you write in—I know we sent in numerous telegrams to them, and anything around 1920 or before that, their records are incomplete,

and you never get any reply from them. They don't know when the gun was made. You can't tell. They have no records.

Mr. TUCKER. That is all.

Mr. RAY. That is all, witness.

In United States District Court

Charge of the court

The COURT. Members of the jury, it now becomes the duty of the court, the proofs having been closed and arguments completed, to charge you upon the law involved in this case.

The defendant here, Frank Delia, is charged in this indictment with having on or about the 25th day of September 1941, at the city of Detroit, setting forth and charging that he was a person who had been previously convicted of a crime of violence, to wit, the crime of robbery while armed, and that he did unlawfully, wilfully, feloniously, and knowingly, receive and posses a fire arm, to wit, one Victor 38 caliber double action number 19435 revolver, which firearms had theretofore been shipped and transported in Interstate Commerce, in violation of the Act of Congress and in violation of law.

The second count charges that upon the same day at the City of Detroit the same defendant, who was a person who had been previously convicted of a crime of violence, to wit, a crime of robbery while armed, did unlawfully, wilfully, feloniously, and knowingly receive and possess two 38 caliber Peters cartridges, and 3 R. W. S. 38 caliber cartridges, which had been theretofore shipped and transported in Interstate Commerce, in violation of law.

20 Those are the charges that are contained in the indictment: and, of course, an indictment is an instrument returned by Grand Jury containing in legal language the charges upon which a defendant is placed upon trial, and those are the only charges made here. Now, these charges set forth, and the indictment is no evidence of the facts that are contained therein, they are simply charges by the government to be true, and based upon the indictment the government introduces its proofs to sustain the charges set forth in the indictment. This indictment is based upon an Act of Congress, which, among other things, provides, and I am now reading Section 902 of the Act of Congress, subdivision F:

"It shall be unlawful for any person who has been convicted of a crime of violence, or is a fugitive from justice"—that isn't

here, the latter portion. There is no claim made that he is a fugitive from justice.

"It shall be unlawful for such person who has been convicted of a crime of violence to receive any firearm or ammunition, which has been shipped or transported in interstate or foreign commerce from one state into another or from one country into the United States; and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter";

and I will allude to that particular presumption, which is set forth in this Act of Congress.

In the first place it is obvious that this Act of Congress applies to one class of persons, persons who have been convicted of a crime of violence, as involved in this case. It applies to others "or is a fugitive from justice." It applies in this case, as alleged in the indictment, that this defendant had been convicted of a crime of violence—robbery armed. Therefore it is the claim of the government that he is brought within this provision of the law; and, that law provides that is unlawful for any person
21 who has been convicted of a crime of violence to receive any firearm or ammunition which has been shipped or transported in interstate commerce or foreign commerce.

Now, that is the provision of the law which gives Congress the power to enact such a law. Why? It involves interstate commerce. The shipments of goods, or passengers, persons going from one state into the other, from a foreign country to the United States. That is interstate commerce. So that it applies here.

At the outset I will state the claims of the government, upon one side, and for the defendant, upon the other; and in stating those claims made you must understand that the burden is upon the government to prove, under the rules of law which I will give you, those claims by evidence presented here. I do not intend to emphasize any of the evidence to you, nor do I intend to state any opinion upon the evidence.

You are the sole judges of the facts. The court's province only is to charge you upon the law, and your province is to determine from the facts, based upon the law and given to you by the court, where the truth lies, and whether or not the government has established under this indictment that the defendant is guilty.

It is the claim of the government that this defendant is within this class set forth in this Act of Congress, that he is a person who was convicted of a crime of violence; and the government claims that that evidence has been presented by records, which were introduced here in evidence, of the court in which he was con-

victed of this offense—robbery armed. Robbery armed is a crime of violence. The government claims that, being within that class, that upon this day in question this defendant was in possession of this pistol or revolver, as described in the indictment, and the cartridges. Whether or not it has proven that theory is for you to determine.

The theory of the government is that upon this day in
22 question, the 25th day of September 1941, this defendant was in the city, down along the docks upon some of the streets there. I do not recall the streets; that there was some controversy there; policemen were there. The government claims that this defendant upon that occasion was in possession of this revolver, and these cartridges; that he exhibited them; held them out. The government claims that he had it in his possession.

And the government further claims that this particular revolver had been involved in interstate commerce; that it came from some other state into Michigan; and that is upon its theory, the government claims from one of the witnesses upon the stand, who was an expert in firearms and cartridges, that this revolver was never manufactured in Michigan, but that it came from outside the state, so that if that particular revolver from outside of the State of Michigan was subsequently found in the State of Michigan then it must have come into the state in interstate commerce. That does not mean we have got to say that it was shipped by express and came in in a parcel. If someone brought it in it was interstate commerce; carrying goods from one state into another. If you were to go into Ohio and make purchases, and come back into Michigan you would be involved in interstate commerce in bringing goods from one state into another. So that the theory of the government is that interstate commerce is involved here; and it must be, else the government has no case.

Congress would not have jurisdiction to enact a law unless interstate commerce was involved in this particular case. So theory of the government is that this gun or revolver was not manufactured in Michigan; therefore someone brought it into Michigan, either in shipment, or *or* otherwise, brought it in; and the theory of the government it that it was in interstate commerce from the state where it was made, and was subsequently found upon this day in question, in Detroit, Michigan, in the hands of the defendant, together with the cartridges which were contained in the revolver.

23 The government further claims that he was shown to be in the possession of it. And the Act of Congress reads:

"That it shall be unlawful for any person who has been convicted of a crime of violence to receive any firearm or ammunition which has been shipped or transported in interstate or foreign

commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped, or transported, or received, as the case may be, by such person in violation of this chapter."

So, the theory of the government is that this revolver was involved in interstate commerce; that it was brought into Michigan; that it was in possession of the defendant upon the day in question, and was loaded with five cartridges down here upon the street. The government claims upon that occasion there was some difficulty down there. We are not involved in any labor controversy here; not a bit of it. It is merely a part of the proofs here, and it is obvious to all of us about what it was; but that is not involved here. Only the charge made in the indictment is involved here.

The government claims that this defendant upon this day in question had that revolver, and exhibited it, and hit others with it, and that he was pointing it at the policeman when the policeman approached him with his revolver drawn upon this defendant and compelled him to deliver it up to the policeman. So the government claims that he was in possession of it. It claims that it has proven that it was in interstate commerce; came from another state; and he become in possession of it. The government claims that that is evidence that the firearm or ammunition was shipped, or transported, or received, as the case may be, by the defendant, in violation of the law. And that applies to both counts in the indictment. One count applies to the revolver, and the other count applies to the cartridges.

So, you see, this is a peculiar case. Congress has aimed at this class of individuals; those who have been convicted
24 of violent crimes. Unless the government could prove that the defendant had been guilty of the crime of the nature involved here, that is robbery armed, within this class, he would not come within that law. So that is the theory of the government; and it is for you to determine whether or not those claims are established under the rules of law, which I will give you.

Now, the defendant, in reply to this charge made against him, denies it by a plea of not guilty. He denies every charge alleged and set forth in this indictment. He is upon trial; and the burden is upon the government, under the rules of law which I will give you, to prove the charges made in this indictment.

He admits, at the outset, that he was convicted of a violent crime—robbery armed—and has served some time, and is on parole, as I understand it, in the Michigan State courts. He admits that. He admits that upon this day in question he was at the scene of action down upon the street along the docks along the river. He admits that upon this day in question he was in

this room up here in the Hofman Building. I think they call it, and there were others there, and that some trouble arose, and they started out. He denies that he had the possession of the revolver at that time, by his testimony. He admits that he went down there to this scene of action; that there was some controversy there; and that he and some others were there; and it is his claim that in the melee there that occurred, someone dropped a revolver on the ground, and he picked it up, and he struck a man over the head with it. He admits that. And the man claims that he hit him, and that is not charged here. It is merely evidence that appears in what we call the res gestae, the facts that are under investigation. And he claims that he had the revolver there, and the policeman appeared, and that he had the revolver out, and that the policeman approached him with his revolver, and that he gave this revolver to the policeman.

25 Now, the government, in reply to those claims, claims that it has given evidence by witnesses who were there, that they saw no revolver dropped upon the ground. The government claims that two witnesses have testified, that their testimony is that this man and another man were together; that they both had their hands in their pockets, coat pockets or trousers pockets, as if they might have a pistol in there. The government claims that these two men testified that the defendant here with a revolver struck another over the head, and wounded him, and blood flowed. And the government claims that from the testimony here that this defendant did not pick up this revolver from the ground, but that he had it all of the time.

Now, those are the facts made up of evidence and sworn to upon the stand in your presence, examined and cross-examined.

The defendant has become a witness in his own behalf, as he has the right to do, under the law. And in weighing his evidence and considering his testimony you have the right to have in mind his interest in the case, and in the result of the case. The question of interest is always an element to be considered by the jury, based upon the theory, legally, that we might be liable to shade our evidence according to our own interest. So in weighing his evidence you should have in mind that fact. However, if you are persuaded of the truth of his evidence you should believe him, notwithstanding the fact that he is the defendant in the case, interested in the case, and interested in the result.

You are the sole judges of the facts, as I have said. You are called upon to analyze these facts, this evidence, in all of its phases. The witnesses upon the stand, in weighing their evidence, do they appear to be truthful? Is their evidence contradicted by other witnesses, or the surrounding facts and circumstances, or is it corroborated, backed up, by the evidence of other witnesses, or the

surrounding facts and circumstances, or probabilities in the case? Where does the truth lie?

26 The defendant comes into this case, as in all criminal cases, presumed to be innocent of the charges that are made against him; and this presumption of innocence remains with him throughout the trial, until the government establishes his guilt beyond a reasonable doubt; not beyond all reasonable doubt, as the term is sometimes used; beyond a reasonable doubt; and a reasonable doubt in law means just what the words fairly imply in their ordinary use and expectation; a reasonable doubt; a doubt for which you can give a reason. It is not an imaginary doubt, or a capricious doubt, or a possible doubt; but it is one based upon reason and common sense. Upon final analysis it is that doubt which you have in your minds after you have carefully weighed all of the evidence that you cannot say that you are satisfied to a moral certainty of the truth of the charges made against the defendnt.

So, the first question for you to determine is this: Has the government, under the rules of law which I have given you, established the fact that he was a person, the defendant, who had been previously convicted of a crime of violence; and that he did unlawfully, wilfully, feloniously, and knowingly, receive and possess the firearm which has been described here, and the cartridges, which firearm had theretofore been shipped and transported in interstate commerce?

If you find, under the law and under the facts, that this defendant, upon this day in question, went there without a revolver, and that the revolver which he held in his hand upon this occasion and drew was picked up from the ground, and he had not prior thereto been in possession of it or had it, he would not be guilty of the crime charged here, because the theory of the government is otherwise. The theory of the government, in the first place, is that this revolver was transported in interstate commerce, and that he had it in his possession prior to the time of going down there. And if he received it from someone, whether he knew it was in interstate commerce or not, would make no difference, because the government claims to have proven here,

27 and the evidence appears to be uncontradicted, that this revolver was involved in interstate commerce; it came from one state into the State of Michigan. And it claims that by reason of the fact that this revolver was never manufactured in Michigan, but was manufactured in another state. So the government claims that this defendant being in possession of this revolver

upon this day in question, that the possession was presumptive evidence that such firearm and the ammunition was shipped, or transported, shipped by express or freight, or carried in by another, or him, in interstate commerce, either by such person or others to his knowledge, in violation of this chapter.

And I will charge you upon that. That is a presumption based upon facts. Even with that statutory presumption the government is not relieved of its duty and responsibility under the law to establish its case, under the rules of law.

I have given you as to the burden of proof on the part of the government. The defendant has gone upon the stand and denied the charges made by the government; denied that he ever transported the revolver; denied that he ever took it down there; claimed that he picked it up from the ground when someone dropped it, and having taken it up used it; he didn't fire it; no claim was made that the revolver was fired, but it was held in a threatening manner against others who were approaching, and so forth, and he ran up the street and was found by the officer.

In passing upon and weighing the evidence of the defendant and passing upon his credibility you have the right to consider the fact that he has been convicted of a crime. You would not be permitted to say that he has been convicted of that other crime, and therefore he must be guilty of this crime. That is not the rule. It only goes to his credibility as a witness; his believability. A man's record for crime as a witness upon the stand is always considered as going to his credibility, his believability, as a witness.

98 So it is your duty under the law to weigh all of the evidence in this case fairly and impartially. Examine the evidence of all of the witnesses. They were sworn in your presence. And in weighing their evidence you would observe their manner and their appearance upon the stand. The evidence which they give. Does it have the ring of truth? Is it contradictory? Is it corroborated, backed up, by their own evidence, or the evidence of other witnesses, or the surrounding facts and circumstances?

If, after a careful analysis of all of the evidence in the case, you are satisfied that the government has established its claim, under the rules of law which I have given you, it would be your duty to return a verdict of guilty as charged in the indictment, the two counts. If you are unable to find the defendant guilty under both counts of the indictment, but should find the defendant guilty under one count, then the form of your verdict would be "We find the defendant guilty" under the count, naming it. The first count applies to the revolver. The second count applies to the cartridges.

If, upon the other hand, you are unable to find that the government has established its case under the rules of law which I have given you it would be your duty to return a verdict in form "not guilty."

Any exceptions, or further requests?

Mr. TUCKER: Your Honor please, in my requests to charge I had asked your Honor to charge the jury the definition of presumption, and that appears upon page 2 and 3 of the request to charge.

The COURT. The presumption set forth in the statute with reference to the defendant that the firearm or the ammunition was shipped, or transported, or received, in interstate commerce is a statutory presumption. It has little weight here because of the fact that the defendant has taken the stand in his own behalf, and he denies the charges made in the indictment. He denies that he was knowingly in possession of the revolver in question, as charged in the indictment, and that his defense is that he
29 never knew or had any knowledge that this revolver was transported in interstate commerce. I have charged you that even though this presumption against the defendant is in the statute it still remains the burden of the government to establish his guilt under the rules of law which I have given you.

Swear an officer.

In United States District Court

Verdict

Filed January 22, 1942

The defendant Frank Delia being present in Court, and the jury heretofore empaneled being again in Court, and having heard the proofs and testimony of witnesses, the arguments of counsel and the charge of the Court, retire from the Bar thereof, under the charge of officers duly sworn for the purpose, to consider their verdict; and after being absent for a time, come into Court again and in the presence of the defendant say upon their oaths that they find the said defendant Frank Delia guilty as charged in the indictment heretofore filed against him.

Thereupon the Court does now here order the sentence of said defendant deferred to January 23, 1942 and said defendant remanded into the custody of the United States Marshal.

EDWARD J. MOINET,
District Judge.

30 In United States District Court

Sentence

Filed January 23, 1942

The defendant, Frank Delia, being present in Court, and being represented by Jack N. Tucker, his attorney, and having, on January 22, 1942, been found, by a Jury, guilty as charged in said indictment, and now being before the Bar of the Court for sentence, and inquired of by the Court if he had anything to say why sentence should not be imposed, and the Court having fully considered all that said defendant had to say in his behalf, thereupon the Court does now sentence said defendant, Frank Delia to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment as follows:

Under Count one (1), imprisonment in a Penitentiary for and during the term and period of five (5) years.

Under Count two (2), imprisonment in a Penitentiary for and during the term and period of five (5) years, said terms of imprisonment to run consecutively, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a Jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such Jail or other place of detention.

EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.
By JOHN C. RAY,
Asst. U. S. Attorney.

31 In United States District Court

Certificate and order settling record on appeal

Filed May 22, 1942

I hereby certify that the foregoing Agreed Statement of Case on Appeal together with the pleadings and testimony designated by the attorneys for the plaintiff and the defendant is correct and fully presents the questions raised by the appeal and the same is hereby approved, settled and allowed as the Record on Appeal.

It is further certified that said record is settled within the time allowed therefor as extended by the Circuit Court of Appeals.

EDWARD J. MOINET,
United States District Judge.

Dated: May 22, 1942.

In United States District Court

Stipulation re comparison of record

Filed May 6, 1942

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

JACK N. TUCKER,
Attorney for Appellant.
JOHN C. RAY,
Attorney for Appellee.

Dated at Detroit, Michigan, this 6th day of May 1942.

32 In United States District Court

Designation as to contents of record on appeal

Filed May 6, 1942

Appellant and appellee by their attorneys hereby designate the following portions of the record, proceedings, and evidence to be contained in the record on appeal in the above-entitled cause:

1. Calendar entries.
2. Indictment of the grand jury.
3. Motion to quash indictment.
4. Verdict of the jury.
5. Sentence of the court.
6. Notice and grounds of appeal.
7. Agreed statement of the case on appeal together with:
   a. Opening statement of United States attorney.
   b. Testimony of Lieutenant Payne.
   c. Charge of the court to the jury.
8. Certificate and Order Settling Record on Appeal.
9. Appellant's assignments of error.

10. Stipulation as to comparison of record.
11. Certification of record by clerk.

JACK N. TUCKER,
Attorney for Appellant.
UNITED STATES OF AMERICA,
By JOHN C. RAY.
Assistant United States Attorney.

33 In United States District Court

Order extending time to settle record on appeal

(Filed May 8, 1942)

Before HICKS and ALLEN, JJ.

Appellant and appellee having filed Application for Order Extending Time to Settle Record on Appeal in the above entitled cause and the Court being duly advised in the premises, now, therefore,

It is ordered that the time for settling record on appeal be and the same is hereby extended to May 25, 1942.

XEN HICKS, *Circuit Judge.*

[Clerk's certificate to foregoing transcript omitted in printing.]

34 IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause argued and submitted

(October 19, 1942)

Before HICKS, ALLEN, and HAMILTON, JJ.

This cause is argued by Morton A. Eden for Appellant and by John Ray for Appellee and is submitted to the court.

35 In United States Circuit Court of Appeals

Judgment

(Entered December 2, 1942)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for proceedings not inconsistent with the opinion of this court.

36 In United States Circuit Court of Appeals,
Sixth Circuit

Nos. 9157 and 9179

No. 9157

WILLIAM MINSKI, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 9179

FRANK DELIA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the District Court of the United States for the Eastern District of Michigan, Southern Division

Opinion

Filed Dec. 2, 1942

Before HICKS, ALLEN, and HAMILTON, Circuit Judges

HICKS, Circuit Judge. These cognate cases are disposed of by one opinion.

Appellant Minski was convicted upon the first and second counts of an indictment which alleged violations of subsection (f) of Sec. 2 of the Federal Firearms Act [52 Stat., ch. 850, p. 1250 et seq., 15 U. S. C., subsections 902 (f) and (i)] and upon a third count which alleged a violation of subsection (i) of Sec. 2 of the same Act.

Appellant Delia was convicted upon both counts of an indictment which alleged violations of subsection (f) of the statute. Subsection (f) is as follows:

"(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, *and the possession of a*
37 *firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped*

or transported or received, as the case may be, by such person in violation of this Act." [Italics ours.]

Subsection (i) is as follows:

"(i) It shall be unlawful for any person to transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been removed, obliterated, or altered, *and the possession of any such firearm shall be presumptive evidence that such firearm was transported, shipped, or received as the case may be, by the possessor in violation of this Act.*" [Italics ours.]

The facts are, that Minski was on November 10, 1921, convicted in the Recorder's Court of Detroit of robbery while armed, and a sentence of 10 to 20 years was imposed. There was substantial evidence that on September 22, 1941, Minski, while driving along the streets of Hamtramck, Mich., was stopped by police officers, who found on the floor of his car a .45 caliber Colt, frontier model, single action, revolver, from which the manufacturer's serial number had been obliterated. The revolver was loaded with five Remington .45 caliber ball cartridges. There was stamped thereon the name and address of the maker and the place of manufacture, to wit, Hartford, Conn. The cartridges were manufactured by Remington Cartridge Company of Bridgeport, Conn. There was evidence that the revolver was 40 or 50 years old.

In Delia's case the facts are, that on October 4, 1930, he was convicted in the Recorder's Court of Detroit of robbery while armed, and was given an indeterminate sentence of from 12½ to 25 years. There was substantial evidence that on September 25, 1941, he was found in Detroit in possession of a Victor .38 caliber, double action, No. 19435 revolver, containing two .38 caliber Peters cartridges and three R. W. S. .38 caliber cartridges. This revolver was made about 1920 by Harrington Richardson in Worcester, Mass. Some of the cartridges were made in Ohio and the others in Germany.

The caption of this Act is: "To regulate commerce in firearms."

Subsection (f) applies to two classes of persons, to wit:
38 (1) those who have been convicted of a crime of violence; and (2) those who are fugitives from justice, but not to either unless they have received a firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Section (i) applies to all who transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been obliterated or altered.

Ordinarily it would not be difficult for the Government to prove that a defendant found with forbidden firearms or ammunition was a convict of the class mentioned, or a fugitive from justice, but to establish that the forbidden articles had been shipped,

transported, or received in interstate commerce, would raise for it an almost insuperable burden unless the law should bring to its aid some character of presumptive evidence. This is true because the circumstances under which the defendant has acquired possession of the forbidden articles are in most cases peculiarly within his knowledge. For this reason the Congress undertook to bring to the aid of the Government, in its task of enforcing the statute, the "presumptive evidence" clauses which we have italicized.

The principal question here is, whether the presumptions provided by subsections (f) and (i) were violative of the due process clause of the Fifth Amendment.

Statutory presumptions, whereby the proof of one fact or group of facts, shall constitute prima facie or presumptive evidence of the main or ultimate fact are not, per se, illegal. Such statutes have been upheld even in criminal cases. Yee Hem v. United States, 268 U. S. 178; Copperthwaite et al. v. United States, 37 Fed. (2d) 846, 848 (C. C. A. 6).

In Mobile, J. & K. C. R. R. Co. v. Turnipseed, Admr., 219 U. S. 35, 42, the court upheld legislation which provided, as a rule of evidence, that the proof of one fact shall constitute prima facie evidence of the main fact in issue, but it pointed out a well-recognized qualification to the rule that it is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

In McFarland v. American Sugar Co., 241 U. S. 79, the court reviewed a statute of Louisiana, which created the rebuttable presumption that any person systematically paying in that state a lower price for sugar than he paid in any other state is a
39 party to a monopoly or conspiracy in restraint of trade. Quoting, as we have done from the Turnipseed case, the court said further:

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. * * * The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. *But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.*" [Italics ours.]

In Manley v. Georgia, 279 U. S. 1, the court had before it a Georgia banking Act which declared that "every insolvency of a bank shall be deemed fraudulent and the president and directors shall be severally punished by imprisonment and labor in the penitentiary * * * provided that the defendant * * * may repel the presumption of fraud by showing that the affairs

of the bank have been fairly and legally administered, * * *"

The court said:

"State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid *if there is a rational connection between what is proved and what is to be inferred.* * * * A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Bailey v. Ala., 219 U. S. 219, 235, et seq. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." [Italics ours.]

In Western & Atl. R. R. Co. v. Henderson, 279 U. S. 639, a Georgia statute provided that upon the mere fact of a collision between a railway train and a vehicle at a highway grade crossing and resulting death, a presumption arose that the company and its employees were negligent in the particulars alleged in the complaint, etc. The court held that the presumption was unreasonable and arbitrary and violated the due process clause of the Fourteenth Amendment. It said:

"A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

In Morrison v. California, 291 U. S. 82, it is said, at page 90:

"What is proven must be so related to what is inferred in a case of true presumption as to be at least a warning signal according to the teachings of experience."

So, also, in Adams v. New York, 192 U. S. 585, 593, it is said:

"The legislature may enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question, *provided the inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary or wholly unreasonable, unnatural or extraordinary.*" [Italics ours.]

To substantially the same effect see Bailey v. Alabama, 219 U. S. 219, 238.

In Insurance Co. v. Weide, 78 U. S. 438, 441, the court said:

"A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known. . . ."

In the Yee Hem case, supra, and the Copperthwaite case, supra, the requisite element of reasonableness in statutory presumptions was adverted to. See also Luria v. United States, 231 U. S. 9,

25. There must be some logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact. If such connection does not exist, it follows, obviously, that a defendant is exposed to conviction upon evidence which has no probative value; or, put in another way, upon no evidence at all. It follows, further, that if at the close of the Government's proof the accused seeks to defend himself, the burden is cast upon him of explaining a situation which up to that point had no incriminating tendency or effect.

41 With reference to subsection (f), we find no basis for the proposition that if an ex convict is found with a firearm or ammunition an inference or presumption follows that he received, shipped or transported those articles in interstate commerce. Such presumption does not exist in fact and cannot be brought into existence by legislative fiat.

Presumptions are founded on the ordinary course of things; and common knowledge or experience does not teach that the class of persons with which we are here dealing usually procures firearms through the channels of interstate commerce. It is as likely that the firearms and ammunition found upon appellants were acquired within the State of Michigan in an intrastate transaction. We are here forced to deal in guess work and one guess is as good as another. Suppose appellants had been apprehended in one of the New England states, where such weapons appear to be manufactured, would the presumption logically arise that they had acquired them or brought them from without the state?

Then again, the Minski revolver was 40 or 50 years old, and the Delia revolver about 20 years old. Is there any reasonable presumption that these weapons were acquired by appellants in violation of this Act after June 30, 1938, the date of its passage?

Equally, under subsection (i), we think it is a non sequitur that the possessor of a firearm from which the manufacturer's serial number has been obliterated must presumptively have transported, shipped, or received it in interstate commerce. The very age of the weapons here involved demonstrates the unfairness of drawing any inferences from the obliterated markings as to the manner of their acquisition or possession.

The guaranty of the due process clause of the Fifth Amendment is, that a law shall not be unreasonable, arbitrary or capricious, and we think that the presumptive evidence clauses of the Act here involved must fall before the Constitutional inhibition. We are aware that some district courts have found otherwise but we are not in accord with such holdings.

The judgments appealed from are reversed and the cases remanded to the District Court for proceedings not inconsistent herewith.

42 [Clerk's certificate to foregoing transcript omitted in printing.]

43 Supreme Court of the United States

No. 636. October Term, 1942

Order allowing certiorari

Filed February 15, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument immediately following No. 569.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 47137. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 636. The United States of America, Petitioner vs. Frank Delia. Petition for a writ of certiorari and exhibit thereto. Filed January 7, 1943. Term No. 636 O. T. 1942.

U S GOVERNMENT PRINTING OFFICE 1943

No. 636

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DELIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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504526—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 636

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DELIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on December 2, 1942, setting aside convictions under Section 2 (f) of the Federal Firearms Act of 1938.

OPINION BELOW

The opinion of the circuit court of appeals (R. 34–39) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 2, 1942 (R. 34). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether Section 2 (f) of the Federal Firearms Act, which provides that the possession of a firearm or ammunition by "any person who has been convicted of a crime of violence or is a fugative[1] from justice * * * shall be presumptive evidence that such firearm or ammunition was shipped or transported or received" in interstate or foreign commerce in violation of the act, is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 2 (f) of the Federal Firearms Act, 52 Stat. 1251, 15 U. S. C., Section 902 (f), reads as follows:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugative[1] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or for-

[1] So in original; probably should be fugitive.

> eign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

STATEMENT

On January 22, 1942, Delia was convicted in the United States District Court for the Eastern District of Michigan upon a two-count indictment charging violations of Section 2 (f) of the Federal Firearms Act (R. 1, 6–7). The first count (R. 6) alleged that on September 25, 1941, Delia "was a person who had been previously convicted of * * * robbery while armed"[2] and that on the same day he did receive and possess a "Victer 38-caliber, double action * * * revolver, which firearms had theretofore been shipped and transported in interstate commerce" (R. 6). The second count repeated the allegation of the previous conviction and alleged further that Delia did receive and possess "two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce" (R. 6–7) The court on January 23, 1942, sentenced Delia to five years' imprisonment on both counts, the sentences to run consecutively (R. 2).

[2] Armed robbery is a "crime of violence" for the purposes of the Act. See Section 1 (6), 52 Stat. 1250, 15 U. S. C., Section 901 (6).

The agreed statement of facts may be summarized as follows:

Witnesses for the Government testified that on September 25, 1941, Delia had in his possession in the City of Detroit, Michigan, a Victor .38-caliber revolver loaded with two .38-caliber Peters cartridges and three R. W. S. cartridges of the same caliber (R. 9). It was also shown by the Government that the pistol was manufactured in Massachusetts before 1920 (R. 12, 15), and that the cartridges were manufactured in Ohio and Germany (R. 13–14); the Government introduced, however, no evidence to show that Delia received, shipped, or transported either the gun or the cartridges in interstate commerce (R. 9).

Delia testified that he picked the pistol up in self-defense after it had been dropped by one of several persons attacking him (R. 8–9). Witnesses for the Government testified that they did not "see the revolver dropped by anyone and picked up by Delia as he claimed" (R. 9).

The circuit court of appeals reversed the convictions on both counts on the ground that the presumption provided in Section 2 (f) is unreasonable, arbitrary, and capricious, and therefore violative of the due process clause of the Fifth Amendment, in that there was no "rational connection" between the fact which must be proved to make the presumption operative and the ultimate fact inferable by virtue of the presumption.

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the presumption clause of Section 2 (f) of the Federal Firearms Act is unconstitutional.

REASON FOR GRANTING THE WRIT

The decision of the circuit court of appeals that the presumption in Section 2 (f) of the Federal Firearms Act violates the due process clause of the Fifth Amendment is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Frank Tot* v. *United States*, decided October 28, 1942, and now pending on petition for a writ of certiorari, No. 569, October Term, 1942, and with the decision of the Circuit Court of Appeals for the First Circuit in *Jose Velazquez* v. *United States*, decided November 27, 1942. In our memorandum in the *Tot* case we have not opposed the granting of the petition insofar as it raises the constitutionality of the presumption provided in Section 2 (f). The same question is presented in our petition for a writ of certiorari filed this day to review the judgment of the circuit court of appeals in *William Minski* v. *United States*. The instant case and the *Minski* case, though tried separately, were decided by the court below in one opinion.

CONCLUSION

For the foregoing reason it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

January 7, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

Supreme Court, U.S.
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No. 636

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Sayre, *Criminal Responsibility for the Acts of Another* (1930) 43 Harv. L. Rev. 689 33

Warner, *The Uniform Pistol Act* (1938) 29 Journ. Crim. L. and Criminology, 529 19

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 636

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 26–31) is reported in 131 F. (2d) 614.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 2, 1942 (R. 25–26). Petition for a writ of certiorari was filed on January 7, 1943, and was granted February 15, 1943 (R. 31). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the presumption clause of section 2 (f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 2 (f) of the Federal Firearms Act of June 30, 1938, 52 Stat. 1250 (15 U. S. C., section 902 (f) in pertinent part [1] provides as follows:

> Section 2 (f):
>
> It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was * * * received, * * * by such person in violation of this Act.

STATEMENT

On January 22, 1942, the respondent, Frank Delia, was convicted by a jury in the United States District Court for the Eastern District of

[1] The Act is set out in full in the Appendix, *infra*, p. 50 *et seq.*

Michigan upon a two-count indictment alleging violations of Section 2 (f) of the Federal Firearms Act (R. 1, 4–5). The first count (R. 4–5) alleged that on September 25, 1941, Delia "was a person who had been previously convicted of a crime of violence, to wit: a crime of robbery while armed"[2] and that he did "receive and possess a firearm, to wit: one Victor 38-caliber double action No. 19435, revolver, which firearm had theretofore been shipped and transported in interstate commerce" (R. 5). The second count repeated the allegation of the previous conviction and alleged further that Delia, again on September 25, 1941, did "receive and possess two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce" (R. 5). The court on January 23, 1942, sentenced Delia to five years' imprisonment on both counts, the sentences to run consecutively (R. 1).

The evidence, which appears in the record largely as an agreed statement of facts (R. 6–7), may be summarized as follows:

On October 4, 1930, Delia had been convicted of armed robbery in the Recorders Court of Detroit, Michigan (R. 6). There was testimony that on September 25, 1941, in Detroit, Delia had a loaded revolver in his possession (R. 7). The

[2]Armed robbery is a "crime of violence" under the definition of Section 1 (6) of the Act.

revolver had been manufactured in Massachusetts some time before 1920, apparently between 1900 and 1920 (R. 9, 12). Some of the cartridges had been manufactured in Ohio and some in Germany (R. 10, 11). The Ohio cartridges had been manufactured some time after 1934, but the date of the manufacture of the German cartridges was not stated (R. 13). The Government introduced no testimony, however, that Delia knew that the gun or the cartridges had been received, shipped, or transported in interstate or foreign commerce or that he actually received, shipped, or transported the gun or the cartridges in interstate or foreign commerce (R. 7).

Delia testified that he picked up the gun in self-defense after it had been dropped by one of several persons who had attacked him, and that he had not seen the gun or possessed it before (R. 7). The witnesses who had testified to Delia's possession also testified that they "did not see any scuffle nor did they see the revolver dropped by anyone and picked up by Delia as he claimed" (R. 7).

The circuit court of appeals reversed the conviction on both counts (R. 25–26), on the ground that the presumption of section 2 (f) is unreasonable, arbitrary, and capricious, and therefore violative of the due process clause of the Fifth Amendment, in that there was no "rational connection" between the fact which must be proved to make the

presumption operative and the ultimate fact inferable by virtue of the presumption.[3]

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the presumption clause of section 2 (f) of the Federal Firearms Act is unconstitutional.

SUMMARY OF ARGUMENT

The court below correctly construed this subsection of the Act as carrying a substantive liability only for receipt which is the termination of interstate transit of the gun or ammunition, but erred in holding unreasonable the presumption that the receipt was interstate and after the effective date of the Act.

A. Local law makes it difficult for a person with a violent-crime record to acquire a gun intrastate, by forbidding him to acquire a gun in the state and penalizing any intrastate transferor; and in the congressional hearings leading to this Act there was informed testimony that the effect of local law was to compel acquisition to take place interstate. Hence,

[3] The court below also reversed, on the same grounds, the conviction in a companion case, *United States* v. *William Minski*, No. 637, in which the Government's petition for certiorari is now pending. The same issue is presented in *Frank Tot* v. *United States*, No. 569, to be argued at the same time as the instant case; and it is also raised in *Jose Casex Velasquez* v. *United States*, No. 713, in which the defendant's petition for certiorari is now pending.

Congress had adequate ground for deeming it likely that acquisitions in such cases take place interstate, and its action in crystallizing that likelihood into a presumption is not unreasonable. *Mobile, etc. R. R. Co.* v. *Turnipseed*, 219 U. S. 35, particularly in view of the fact that the transactions are in violation of local policy and that the actual facts regarding them are known only to the defendant. *Yee Hem* v. *United States*, 268 U. S. 178; *Casey* v. *United States*, 276 U. S. 413.

Since there was testimony before Congress, confirmed from other sources, that persons with violent-crime records are particularly likely to move interstate to commit crimes elsewhere than in their states of residence, Congress had power to enact a prohibition of even intrastate acts reasonably deemed preparatory to dangerous interstate movement, as action on behalf of states other than that of acquisition. *United States* v. *Darby*, 312 U. S. 100, 118. Hence even if the particular inference embodied in the presumption be regarded as in itself improbable, it is valid as a prohibition plus an exemption for those who could prove that they acquired intrastate, and the policy of granting such an exemption is not a matter for judicial review. *Ferry* v. *Ramsey*, 277 U. S. 88.

B. Although there is no probability of acquisition subsequent to the effective date rather than prior to it, at least on the facts of the instant case,

the defendant best knows the date of acquisition, and can validly be required to come forward with evidence on the point, as a regulation of the order of proof ancillary to the valid main presumption of manner of acquisition. Requiring the production of evidence of the exemption of an activity otherwise indistinguishable from activity subject to the statute is a sanctioned method of meeting the recognized need for drafting a workable statute. *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192; *United States* v. *Darby*, 312 U. S. 100, 118, 125.

C. The presumption herein cannot be said to deprive defendant of a fair trial and thus to violate the due process clause, because it has the same effect as the presumption of constitutionality would have if the substantive provisions of the statute penalized possession instead of interstate receipt. If the statute were so framed, the defendant would have the burden of proving that he had acquired his gun in an intrastate transaction (*Williams* v. *Walsh*, 222 U. S. 415; *Hatch* v. *Reardon*, 204 U. S. 152; *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *United States* v. *Miller*, 307 U. S. 174, 178) before he could complain of any invalidity in the statute. If the time of his acquisition was relevant to his attack, he would be required to prove it as well. *Stockholders* v. *Sterling*, 300 U. S. 175, 184.

ARGUMENT

THE PRESUMPTION OF SECTION 2 (F) OF THE FEDERAL FIREARMS ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The court below, in invalidating the presumption of section 2 (f) of the Act, held it unreasonable as failing to meet the test of "logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact" (R. 30) in two respects: first, that "common knowledge or experience does not teach that the class of persons with which we are here dealing usually procures firearms through the channels of interstate commerce"; second, that as illustrated by the gun in the case, upwards of twenty years old at the effective date of the Act and found on defendant only three years after the effective date, it was similarly arbitrary to presume acquisition by the defendant subsequent to rather than prior to the effective date of the Act (R. 30). We shall treat each of these grounds of decision separately, for in our view the considerations governing them are not entirely the same.

Introductory—Construction of the Subsection.—Section 2 (f) forbids a person who has a violent crime record to receive a gun or ammunition "which has been shipped or transported in inter-

state or foreign commerce."[4] This phrasing suggests two alternative possible meanings: (1) it prohibits receipt of a gun or ammunition at the termination of a shipment in interstate or foreign commerce; or (2) it prohibits receipt of any gun or ammunition which at any time in its prior career had moved in interstate[5] commerce. The court below, in concluding that the presumption was invalid for asserted want of sufficient inherent probability to warrant the inference that the possessor acquired the gun or ammunition in interstate commerce after the effective date of the statute, necessarily construed the statute as imposing substantive criminal liability only for receipt which is the termination of an interstate transit. This construction precludes the second construction, which would impose liability for an intrastate acquisition after an *independent* interstate transit. If the second and broader construction is proper, liability is imposed for intrastate as well as interstate acquisition of an object which

[4] Cf. the other receipt crimes of the statute, Appendix, *infra*, p. 3. Section 2 (b) makes it unlawful to "receive any firearm or ammunition transported or shipped" interstate under the conditions stated therein; section 2 (b) makes it unlawful to "receive * * * any firearm or ammunition moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen" under the stated conditions; section 2 (i) makes it unlawful to "transport, ship, or knowingly receive" interstate under the stated conditions.

[5] Here and hereafter "interstate" is used to include "foreign" where the context does not forbid.

has at one time been in interstate movement, quite apart from the acquiror's participation in or perhaps even his knowledge of the prior interstate career of the object, and perhaps even quite apart from the date when it entered the state. On that basis much of the due process difficulty found by the court below would disappear, for it would not be necessary to presume interstate acquisition where, as here (R. 9–11), there was actual proof of extrastate origin and hence of sometime interstate travel of both gun and ammunition. This treatment of the statute would thus shift the constitutional problem from the validity of the presumption of interstate commerce as a matter of due process to the validity of the substantive liability as an exercise of the commerce power after the transit had ceased. The question would be that reserved in *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 53, whether Congress has power to impose personal liability with respect to "contraband of commerce" after the commerce is over. Compare *McDermott* v. *Wisconsin*, 228 U. S. 115, *Brolan* v. *United States*, 236 U. S. 216, and *Brooks* v. *United States*, 267 U. S. 432, 439, with *Keller* v. *United States*, 213 U. S. 138, and *Schechter Corp.* v. *United States*, 295 U. S. 495.

In our view, however, the narrow substantive construction adopted by the court below was proper, and that court erred only in invalidating the presumption under the statute so construed. The same substantive construction, moreover, was

adopted in the trial court, which received defendant Delia's evidence of intrastate acquisition and made it the turning point of the charge to the jury, according to it the status of a complete defense (R. 18, 20–21, 22). There was no exception to this charge, or any request for further charge. Since the trial court thus treated the defense testimony of intrastate acquisition, more than three years after the statute became effective and without participation in or even knowledge of any interstate transaction, as the turning point of the case, defendant was convicted in the trial court on the same construction of the subsection adopted by the court below and urged herein. Accordingly, the constitutional problems arising out of the broader construction need not be considered. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 145; *United States* v. *Walter*, 263 U. S. 15, 17–18; *United States* v. *Wurzbach*, 280 U. S. 396, 399; see also *Williams* v. *Walsh*, 222 U. S. 415, 421; *Dillingham* v. *McLaughlin*, 264 U. S. 370, 374; *Hart* v. *Virginia*, 298 U. S. 34, 35; *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 15, 17–18; cf. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

The propriety of the narrow construction appears from considerations both on the face of the statute[*] and in its legislative history. The word

[*] The pertinent portion of the statute provides: "It shall be unlawful * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce * * *."

"receive" alone suggests the consummation of a transaction which prior thereto was incomplete.[7] "Acquire," "obtain," or indeed simply "possess," would have been more appropriate substantive words to designate the forbidden act if it had been meant to be independent of the prior shipment or transportation.

The development of the statute in Congress points in the same direction. The original bill, S. 885 of the 73rd Congress, was subjected to a series of revisions and reintroductions as S. 2258 and S. 3795 in that Congress, and S. 3 in the 74th and 75th Congresses, under the constant sponsorship of the Senate "Special Committee on Crime."[8] The instant section 2 (f) first appears

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[7] Cf. the explanation of Section 2 (f) before the House Committee: "Subdivision (f) provides that a person who has been convicted of a crime of violence or who is a fugitive from justice may not *receive a shipment* of a gun." Hearings, Subcommittee of H. Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (S. 3), p. 9 (italics supplied). The witness, Major Gen. Milton A. Reckord, had been one of the draftsmen of the statute. Hearings, S. Committee on Commerce, 74th Cong., 1st Sess. (S. 3) pp. 1, 43. His testimony is an appropriate source from which to ascertain the Congressional purpose. *Securities and Exchange Comm.* v. *Robert Collier & Co.*, 76 F. (2d) 939 (C. C. A. 2); *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 538, 547.

[8] S. Rep. No. 1189, 75th Cong., 1st Sess., pp. 32–33. This committee, also known as the "Committee on Racketeering" or "Committee on Crime and Criminal Practice," was a subcommittee of the Senate Committee on Commerce, consisting of Senators Copeland, Murphy, and Van-

in S. 3795. That there was no intention to have it penalize a receipt independent of an interstate transaction appears from the fact that at the same stage a related section, cast in similar language, was otherwise modified to avoid exactly that construction for constitutional reasons. The predecessor draft, S. 2258, had contained a section 2 (b), along the general lines of the present section 2 (b), relating to acquisition of guns shipped into the state in violation of the licensing provisions of Section 2 (a). The then language, however, was in broad terms,[2] patently borrowed from section 4 of the National Motor Vehicle Theft Act, 41 Stat. 324, 18 U. S. C., section 408; see also National Stolen Property Act, Sec. 4, 48 Stat. 795,

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denberg, acting in pursuance of S. Res. 74 and 196, 73rd Cong., and S. Res. 306, 74th Cong. The committee had held extensive hearings on the crime problem in general, Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d Sess. (S. Res. 74), as well as specific hearings on firearms bills. Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2nd Sess. (S. 885, S. 2258, S. 3680); and had acted as Senate sponsor for the numerous statutes comprising Attorney General Cummings' crime control program. S. Rep. No. 1440, 73rd Cong., 1st Sess., *passim;* S. Rep. No. 1189, 75th Cong., 1st Sess., pp. 1–5, 40–52.

[2] "It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any firearm shipped in interstate or foreign commerce" by an unlicensed person, knowing the firearm to have been so shipped. The text of this draft is set out in Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d Sess. (S. 885, S. 2258, S. 3680), p. 1.

18 U. S. C. section 416. A witness pointed out to the committee that section 2 (b) in that form raised constitutional doubt, "because it seems to me that it undertakes to exercise Federal control over articles of merchandise, long after they have in fact ceased to be a part of interstate commerce." Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d Sess. (S. 885, S. 2258, S. 3680), pp. 91–92. The point was of course a restatement of the treatment accorded section 4 of the National Motor Vehicle Theft Act in *Brooks* v. *United States*, 267 U. S. 432, 439, where this Court sustained the broad language of storing and concealing only because of its restriction to matter "moving as, or which is a part of, or which constitutes interstate or foreign commerce."

In accordance with the witness' suggestion, the committee thereupon revised section 2 (b) into substantially its present form, with acts other than receipt deleted. The other acts mentioned in the old section 2 (b) appeared in the new bill (and ultimately in the statute) only in a new section 2 (h), which borrowed the rest of the pattern of the National Motor Vehicle Theft Act by making it unlawful to "receive, conceal, store, barter, sell, or dispose of any firearm or ammunition or to pledge or accept as security for a loan any firearm or ammunition *moving in or which is a part of* interstate or foreign commerce, and which while so moving or constituting such part has been

stolen, knowing, or having reasonable cause to believe the same to have been stolen." [Italics supplied.] It was in this very revision that section 2 (f), making it unlawful for a person of the class designated to "receive a firearm which has been shipped or transported" etc., was first added, indeed as an adoption of another suggestion of the same witness who had made the point of constitutional law as to section 2 (b).[10] It seems clearly untenable to assume that the committee, having narrowed the scope of section 2 (b) for no other reason than to avoid constitutional question under the commerce clause, enacted the new section 2 (f) either in ignorance of the judgment of constitutional law which it had just made as to the old section 2 (b) or with the deliberate intent to fly

[10] The germinal idea of section 2 (f) was advanced before the Special Committee as a proposed substitute for certain of the provisions of S. 3680 and H. R. 9066, 73rd Cong., the bills which in revised form (H. R. 9741, 73rd Cong.) became the National Firearms Act of 1934, 48 Stat. 1236, Internal Revenue Code Secs. 2720–2733, 3260–3263. The bills, as introduced, had defined "firearm" to include pistols and revolvers. S. 3680 and H. R. 9066, 73rd Cong. Representatives of sportsmen's organizations and of the Commissioners on Uniform Laws had raised objection to the registration provisions and the cumbersome machinery of transfer, Secs. 4, 5, Internal Revenue Code Secs. 2723, 3261, as an unwarranted burden on the ordinary law-abiding citizen. In view of these objections, the 1934 Act, as enacted, was restricted to machine guns, sawed-off shotguns and silencers, sec. 1 (a), Internal Revenue Code Sec. 2733 (a). S. Rep. No. 1444, 73rd Cong., 2d Sess., p. 2; H. Rep. No. 1780, 73rd Cong., 2d Sess., p. 2; Hearings, H.

in the face of that judgment. See *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 123–125.

While the bare language of the statute might be construed to include an acquisition unconnected with the past interstate transaction, we feel certain in view of this legislative history that in a case which squarely raised the question by indisputable evidence that the defendant acquired the gun in a purely intrastate transaction, e. g., by open purchase from a dealer's stock, the Government would not be in a position to urge that the ambiguity be resolved against the defendant

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Committee on Ways and Means, 73rd Cong., 2d Sess. (H. R. 9066), pp. 43–44, 58–59, 62, 113, 129, 143; Hearings, Subcommittee of S. Committee on Commerce, 73d Cong., 2d Sess. (S. 885, S. 2258, S. 3680), pp. 24, 31, 56, 88; Hearings, S. Committee on Commerce, 74th Cong., 1st Sess. (S. 3), p. 21. As an alternative to take care of pistols and revolvers (and indeed all guns) in the hands of criminals while letting law-abiding persons alone, the sportsmen's representatives submitted to the Special Committee drafts of a provision using the commerce clause plus presumptions of commerce, to operate only on transients with violent-crime records and on fugitives, the approach of the present section 2 (f). Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2d. Sess. (S. 885, S. 2258, S. 3680), pp. 20, 59, 94–96; see also Hearings, H. Committee on Ways and Means, 73rd Cong., 2d Sess. (H. R. 9066), pp. 61, 128. The Special Committee adopted the suggestion, expanded it to drop out the restriction to transients, and embodied it as section 2 (f) of its own bills. S. Rep. No. 1189, 75th Cong., 1st Sess., p. 33; Hearings, S. Committee on Commerce, 74th Cong., 1st Sess. (S. 3), p. 1; Hearings, Subcommittee of H. Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (S. 3), pp. 3–4.

by taking away from him the substantive defense of intrastate acquisition. We therefore construe the statute narrowly as did the court below, as making available the substantive defense, thus facing the constitutional question passed on by the court below.

A. THE PRESUMPTION OF INTERSTATE COMMERCE

The most frequently applied test of the validity of a statutory presumption under the due-process clause is that of a "rational connection" between facts proved and facts presumed, *Mobile, etc. R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43. To meet this test, the relationship between the two types of facts need not be so close and direct as that which must obtain to take an ordinary circumstantial evidence case to the jury, for if that were true no presumption at all would be needed. Cf. *Bailey* v. *Alabama*, 219 U. S. 219, 235. For procedural purposes in relieving the proponent of the burden of supplying proof until the opponent has come forward with disproof, it is recognized that presumptions properly have "artificial" value in excess of the inherent probative force of the inferences they embody. *Yee Hem* v. *United States*, 268 U. S. 178, 185. Accordingly, the rational connection requirement, in the terms of the *Turnipseed* case itself, is merely "that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate," 219 U. S. 35, 43; or that the proved facts have at

least a "sinister" significance in the direction of the presumed fact. *Morrison* v. *California*, 291 U. S. 82, 90.

An alternative and often closely related test of the validity of a presumption emphasizes its rebuttability, treats it as a mere regulation of the order of proof, and determines its validity by the relative accessibility of proof to the prosecution and the defense. Under this test, a presumption is valid which seeks to have the opponent come forward with facts accessible to him but not to the proponent, while if the facts are not accessible to the opponent their unaccessibility to the proponent will not validate the presumption. *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Casey* v. *United States*, 276 U. S. 413, 418; *Morrison* v. *California*, 291 U. S. 82, 91. A presumption which passes this test may be valid notwithstanding its failure to meet the "rational connection" test. *Morrison* v. *California*, 288 U. S. 591; *Morrison* v. *California*, 291 U. S. 82, 88, 91.

The court below apparently gave no consideration to the possibility that the presumption herein was supportable under the second test, and held the presumption invalid solely because in the court's opinion it failed to satisfy the standards of the first test. The court erred, we submit, in each respect, for the presumption may be sustained under either test.

First.—The presumption is valid under the "rational connection" test because of two conditions

overlooked by the court below. The first of these conditions arises from the fact that the bulk of the small-arms industry of this country is centralized in the New England states,[11] so that to be found in defendant's hands in Michigan any gun or ammunition probably traveled across the state line if it were of domestic make and of course must have so traveled if it were of foreign make.[12] Second, there is a practical difficulty of intrastate acquisition of guns by men like defendant. Michigan, like some thirty other states, has firearms control laws.[13] Not only would defendant have violated Michigan law by acquiring his gun intrastate, but any intrastate transferor would have violated it by placing the gun in defendant's

[11] Department of Commerce, Bureau of the Census, *Biennial Census of Manufacturers* (1937), pt. 1, p. 926. The single Michigan manufacturer listed was not a manufacturer of revolvers or pistols. (R. 12.) For ammunition, *ib.* 628, showing one Michigan manufacturer, but Connecticut the most important state in the industry.

[12] This probability is illustrated by this and its companion cases, for there was direct and detailed testimony of extrastate origin in three (R. 9–11; No. 636, R. 12; No. 569, R. 37), and equally although less detailed testimony in the fourth (No. 713, R. 22).

Of course this factor would not be present if the defendant were in one of the manufacturing New England states, but Delia cannot raise this objection. *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

[13] The state laws vary too widely in detail for accurate tabulation. Provisions are collected in Warner, *The Uniform Pistol Act* (1938), 29 Journ. Crim. L. and Criminology, 529. Legislation restricting intrastate acquisition by per-

hands, for no one may acquire a pistol within the state without a license, no license may be issued to a person like defendant who has been convicted of armed robbery, and the transferor is required, subject to criminal penalty, to take up the license from the transferee and turn it over to law enforcement authorities.[19] The state penalty imposed on the transferor is a distinct obstacle to the local acquisition of a gun by a person like defendant. *Thus the local laws at the very least give* rise to some degree of probability that the acquisi-

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sons with violent-crime records is of three general types: (1) forbidding such persons to possess, and facilitating discovery of their possession by requiring transferors (usually dealers but sometimes private persons as well) to keep records of transfers open to law-enforcement authorities or to report each transfer; (2) licensing possessors (of concealed weapons) and acquirors (even if not to be concealed), forbidding unlicensed possession or acquisition, forbidding issue of license to persons of the class in question, and forbidding transfer to them without license; (3) forbidding transfer to them if their criminal record is known to the transferor. Detailed citations for Michigan and New Jersey, the states involved in this and the *Tot* case, appear in the next footnote.

[19] Mich. Stat. Ann. Sec. 28.92. The provisions date back to 1927, prior to Delia's 1930 (R. 6) conviction, and also prior to July 30, 1938, the effective date of the instant statute, Section 9. The Michigan statute is in terms of "sale" of "pistols" to persons convicted of "felony," but "seller" includes a person transferring by gift or loan as well as sale, and "pistol" includes any weapon of barrel length of 30 inches or less. Mich. Stat. Ann. Sec. 28.91. Armed robbery, the crime appearing on Delia's record (R. 6), is a felony under Michigan law. *Ib.*, Secs. 28.196, 28.797. In addition, Michigan has had since 1925 a requirement of

tion of firearms by men like defendant is not an intrastate transaction within the reach of the local law. Clearly, absolute probability is not necessary to support the presumption under the "rational connection" test, else the inference would follow naturally and no statute would be needed to create it. *Bailey* v. *Alabama*, 219 U. S. 219, 235.

Moreover, this Court has treated such local prohibitions as indicating a factual pattern of normal compliance sufficient to justify Congress in raising a presumption of importation which imposes upon a possessor the burden of coming forward with facts within his knowledge, to explain his deviation from the local pattern: in *Yee Hem*

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registration of guns possessed, first by way of a direct registration statute, Mich. Pub. Acts 1925, No. 313, Sec. 11 (Acts, 1925, p. 476), and under the 1927 law by provisions for "safety inspection" which set up a system of permanent official record of the description of the possessor and the gun. Mich. Stat. Ann. Sec. 28.97. Dealers are required to keep records of sales. Mich. Stat. Ann. Sec. 28.429.

Petitioner Tot, in No. 569, is in a somewhat similar position under New Jersey law, because of this convictions for assault and for breaking and entering at night (No. 569: R. 14-15, Gov't. Exh. 5 original). Since 1927 intrastate acquisition without license is forbidden, no license may be issued to a person with Tot's record, and no one may sell without presentation of the license and notification to the law enforcement authorities. N. J. R. S. (1937), secs. 2:176-2, 5, 8, 24, 33, 35, 44. Gift does not appear to be forbidden, nor unlicensed acquisition prior to 1927, but since 1912 any intrastate transferor has been required to notify law enforcement authorities. *Ib.*, sec. 2:176-4.

v. *United States, supra,* sustaining the rebuttable presumption of unlawful importation of smoking opium, arising from possession, the Court said:

> By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress. 268 U. S. 178, 184.[12]

See also *Casey* v. *United States,* 276 U. S. 413, 418, sustaining the presumption of the Harrison Act that narcotics possessed were purchased un-

[12] The statute involved was expanded by subsequent amendment, Act of May 26, 1922, to its present form, 21 U. S. C. Sec. 174, applying to all "narcotic drugs," and has been uniformly so sustained notwithstanding the contention of greater probability of unimported possession of narcotics other than smoking opium, since some of them are manufactured in this country. Cases are collected in *Bugler* v. *United States,* 86 F. (2d) 41, 42 (C. C. A. 7), certiorari denied, 300 U. S. 677.

stamped because it dealt "with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by violation of law." If defendant acquired his gun in Michigan in accordance with the state laws just outlined, the Michigan license record of the transaction would almost certainly be available as a public record "easily proved," to remove him from the peril of the federal statute.[16]

When Congress was considering this and related subsections,[17] evidence was before it that interstate acquisition of guns was common and had resulted in a partial breakdown of the effectiveness of state gun laws. The Senate's "Special Committee on Crime," sponsor of the statute,[18] had had before it the testimony of the Police Commissioner of New York City concerning interstate evasion of New York State's famous Sullivan law,[19] to the

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[16] Such use of the federal power to supplement state legislation by acting directly to prevent interstate evasion is familiar under the commerce clause. *United States* v. *Darby*, 312 U. S. 100, 115; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 348-349; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 323.

See also the comment by the Commissioners on Uniform Laws, 9 Uniforms Laws, Anno. (1942 ed.) 586, on the effect of the instant Act as an encouragement of similar local legislation in states which now lack it.

[17] Subsection (e) of section 2 prohibits similar interstate shipment or transportation of guns.

[18] See note 8, *supra*.

[19] N. Y. Penal Law, sec. 1914.

effect that one-fourth of the guns confiscated by his officers during a two-year period had been "bootlegged into" the state. (Hearings, Subcommittee of S. Committee on Commerce, 73rd Congress, 2nd Session (S. Res. 74), p. 9.) To the same effect, the committee heard the testimony of a captain of the New York State Police, recommending legislation on the interstate transportation of guns, because he thought the Sullivan Law "a washout." (*Ib.* 58.)[29] There was similar testimony by the Chief of Police of Detroit, Michigan, on the practical effect of the local laws of Michigan, the state of Delia's possession, as diverting to other states the bulk of the acquisitions by persons ineligible under Michigan law, notwithstanding sporadic violation of the Michigan law. His figures showed over 16 per cent of the guns confiscated over a four-year period were foreign-made (*Ib.* 210–211), and on inquiry on how they got into the state he testified:

> They have been brought in here in some manner, and I do not think that State legislation in any manner is going to stop the carrying of guns. There may be * * *

[29] See also the statement by another New York City Police Commissioner, of a practice involving "hundreds of guns annually," whereby New York resident purchasers evaded the Sullivan Law by claiming to be nonresidents, instructing the New York dealers to deliver to an address in an adjoining state, picking the gun up in that state and returning to New York. *New York Times*, May 5, 1935, p. E–11.

> a Federal statute that would govern bringing across from one State to another any gun. It might help considerably * * *. They were mail-order guns until the law was passed stopping the mailing of them.[21] They come in, I think, to legitimate dealers in towns where they are allowed to sell them. We have them here in our gun salesrooms. *They are sold, I think, very little here because of our State law, but certainly in some cases they are sold without permits.* But there are States very close to our border lines that have no law at all governing guns.[22] *Ib.* 211. [Italics supplied.]

When dealing with most presumptions, judicial or statutory, the courts have had no better guide than "common knowledge or experience" (R. 30) to inform them whether the proved facts have the requisite "sinister significance" (*Morrison* v. *California*, 291 U. S. 82, 92) in the direction of those presumed. In no case in which a statutory presumption has been invalidated in this Court as running beyond common knowledge or experience, however, has there been involved a showing, such as is presented by the instant legislative record, that a specialized expert knowledge of the probabilities in the field has actually been brought

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[21] The reference is apparently to the Act of February 8, 1927, 44 Stat. 1059, 18 U. S. C. 361.

[22] See also the testimony, R. 13–14, on the operation of the Michigan statute, and the Michigan practice of purchasing guns in Ohio "like you would buy popcorn here."

to the attention of the legislative body. Here there is no justification for holding, as did the court below, that "common knowledge or experience" controls the issue. Appraisal by qualified experts having confirmed before Congress the probability of interstate acquisition implicit in the existence of the state laws on the statute books, the congressional judgment, that it is proper to raise against a man with a criminal record sufficient to make unlawful an intrastate transfer to him a rebuttable presumption of acquisition elsewhere, cannot be dismissed as arbitrary. *United States v. Carolene Products Co.*, 304 U. S. 144; *Stafford v. Wallace*, 258 U. S. 495, 521; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 37.

Second.—The presumption also may be sustained under the second test, that making opportunity of knowledge and access to the proof the determining factors. There is such a "manifest disparity" (*Morrison v. California*, 291 U. S. 82, 91) between the opportunity for knowledge of the prosecution and that of the defendant that little need be said about it. Better than anyone else the defendant knows where and when he acquired his gun and ammunition. Thus the availability of this test as support for the presumption turns on the relative positions of the prosecution and defendant respecting accessibility to proof.

The superior opportunity for knowledge of the defendant gives him a readier access to the proof,

because it immediately solves for him the initial problem of where and from whom he acquired the gun and ammunition. If the prosecution were required to prove this fact, it is difficult to see how, in the normal case, the prosecution could avoid having to interrogate every gun seller in the entire United States until the right one was found. The local dealers and police would not have a record of the sale in any case except one where the purchase was intrastate, *i. e.*, where the defendant was innocent. The defendant, on the other hand, who knows where he acquired the gun and ammunition, has the power to subpoena the seller and his records, who will be compelled to testify even if the sale was in violation of the laws of the state where made.[23] Furthermore, the defendant has a better knowledge than the prosecution of those among his friends and associates who can testify to the period of his possession and similar facts casting light on the time and place of acquisition.

It is true, of course, that if the defendant himself takes the stand[24] to give testimony to rebut the presumption, the jury may discount his testimony because of his prior criminal record. This

[23] The privilege against self-incrimination in federal courts does not extend to state crimes. *United States* v. *Murdock*, 284 U. S. 141, 149.

[24] The statute is not subject to objection under the Fifth Amendment because of any tendency to compel the defendant to take the stand. *Yee Hem* v. *United States*, 268 U. S. 178, 185.

cannot affect the issue, however, since to do so would be to write exemptions for recidivists into the possession presumption of the smuggling statute (46 Stat. 751, 19 U. S. C. Sec. 1593), and of the Harrison Act (38 Stat. 785, I. R. C. Sec. 3224; 40 Stat. 1130, I. R. C. 2553), and of the National Firearms Act of 1934 (48 Stat. 1236, I. R. C. Sec. 3261 (e)), and even into the common-law possession presumption in theft and homicide cases (*Wilson* v. *United States*, 162 U. S. 613, 619–621). As Judge Goodrich stated in the companion *Tot* case: "That the trier of the fact will not believe one's story is a risk common to all litigants." *United States* v. *Tot*, 131 F. (2d) 261, 271 (C. C. A. 3).[25]

The well-established principle that unavailability of proof in a particular case, to sustain a burden resting upon a litigant, is "a misfortune to be borne by him" (*Burnet* v. *Houston*, 283 U. S. 223, 228), has been applied by this Court to sustain the validity of a presumption arising from possession in a criminal case:

> If the accused happens to be the only repository of the facts necessary to negative the

[25] The fact that neither in the *Delia* case nor in the *Tot* case did the jury believe the defendant's story is not an indication that a recidivist will never be believed. Each told an inherently improbable story of his acquisition of his gun, and as the jury observed the demeanor of each, it had cause for disbelieving each defendant entirely apart from their past records. The problem of rebuttal is discussed at greater length in Point II of the Government's brief in the *Tot* case, now pending as No. 569 in this Court.

> presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. * * * *Yee Hem* v. *United States*, 268 U. S. 178, 185.

The relative extent of the burdens resting on the prosecution and the defendant should be borne in mind in weighing the fairness of casting an affirmative burden on the defendant by means of the presumption. In the absence of the presumption, the prosecution doubtless without the assistance of testimony from the defendant would have to prove beyond a reasonable doubt that the defendant received gun and ammunition at the immediate termination of an interstate shipment. The defendant, however, need not establish his affirmative defense beyond a reasonable doubt or even by a preponderance of the evidence. He need only create a reasonable doubt that he is guilty as charged (*Davis* v. *United States*, 160 U. S. 469; *Matheson* v. *United States*, 227 U. S. 540), which means that unless the jury is satisfied beyond a reasonable doubt that his affirmative defense is false it must acquit him.[28]

We submit, therefore, that the defendant's readier knowledge of the facts and accessibility to proof justifies casting the burden on him by means of the presumption.

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[28] In the companion case, *Frank Tot* v. *United States*, No. 569, Tot contends that presumption places an even slighter burden on the defendant. The rule stated in the text hereinabove is that for which we argue in the *Tot* case.

Third: The state legislation and the expert evidence presented to Congress refer only to guns, not ammunition, and therefore the first test, discussed above, pp. 19–26, unlike the second test, does not support the presumption arising from possession of ammunition, involved under the second count of the indictment (R. 5). This presumption may, however, be rested on different considerations, which serve also as additional support for the presumption as to guns. This Court has pointed out that the two presumption tests just discussed do not exhaust the possibilities (*Morrison* v. *California*, 291 U. S. 82, 91):

> The decisive considerations are too variable, too much distinctions of degree, too dependent in the last analysis upon a common-sense estimate of fairness or of facilities for proof, to be crowded into a formula. * * *

Statutory presumptions had been regularly sustained by this Court against attack on due process grounds long before the rise even of the *Turnipseed* formula. *Turpin* v. *Lemon*, 187 U. S. 51, 59–60; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729; *Minn. & St. L. R. Co.* v. *Minnesota*, 193 U. S. 53, 63; *Williams* v. *Kirtland*, 13 Wall. 306, 310. The *Turnipseed* case itself, on its facts, amounts to nothing more startling than a familiar rule of *res ipsa loquitur*, a presumption of the railroad's negligence arising from proof of injury to a bystander by virtue of a derailment, for the

situation is normally under the railroad's control. This Court's settled practice of testing the validity of a statute by practical effect rather than language (*Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443; cf. *Harrison* v. *Northern Trust Co.*, decided January 11, 1943, No. 103, this term), applies in the presumption field. If the practical effect of the presumption, unrebutted, is to reach a result beyond legislative power, the presumption falls if it fails to meet the standard tests. *Bailey* v. *Alabama*, 219 U. S. 219, 244; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86–87. But if that result lies within direct reach of the legislative power, the presumption is sustained as reaching a permissible result, notwithstanding that it might not meet the *Turnipseed* or some other rule-of-thumb test. *Ferry* v. *Ramsey*, 277 U. S. 88.

In *Ferry* v. *Ramsey*, a statutory civil liability of a bank director for permitting the receipt of deposits after he acquires knowledge of insolvency of the bank was reinforced by a statutory presumption of his knowledge. Mr. Justice Holmes' prevailing opinion sustained the presumption, notwithstanding that it lacked sufficient probability to meet the "rational connection" test,[27] because

[27] Further, since knowledge itself was being presumed, the presumption could not be grounded on the "opportunities for knowledge" test of the *Yee Hem* and *Morrison*

the effect of the statute with the presumption was something less than the imposition of a liability on receipt after insolvency regardless of knowledge. As the legislature had the power to impose that absolute liability it also had the power, by arbitrary act of grace as it were, to exempt from that liability if the director could actually show he had no knowledge:

> The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it. 277 U. S. 88, 94.

Mr. Justice Sutherland's dissent frames the issue sharply, for it starts from the fact—which the prevailing opinion does not dispute—that there was only a negligible probative connection between fact presumed and fact proved, but insists on treating the statute precisely as written, as an unreasonable presumption statute rather than a reasonable though oddly drafted substantive statute carrying a limited exemption:

> I should have supposed the liability of the director must be measured by what the state has enacted and not by what it had the power to enact. 277 U. S. 88, 97.

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cases, for the basic assumption of the latter test is that the facts are within the knowledge of the person against whom the presumption operates.

Contra, dealing with an absolute presumption, *Heiner* v. *Donnan,* 285 U. S. 312, but see dissenting opinion of Mr. Justice Stone, 332, 335.[28]

From *Ferry* v. *Ramsey,* therefore, it follows in principle that if Congress had the intent and the power under the commerce clause to make it a substantive crime for men like defendant to possess guns or ammunition or to acquire them at all, its roundabout achievement of something less than that result, by imposing a presumption of receipt in interstate commerce springing from possession, is valid under the due process clause even if the inference of that particular sort of receipt be regarded as unfair or improbable. We submit that it had both that intent and that power.

The prohibitory purpose is demonstrated in the committee reports. The Special Committee on Crime expressed its fears of the constitutionality

[28] Cf. *Manley* v. *Georgia,* 279 U. S. 1, invalidating a statute imposing criminal liability upon bank officers in the event of fraudulent failure, and setting up a rebuttable presumption of fraud arising from the failure. *Ferry* v. *Ramsey* was not cited, notwithstanding the close similarity of the factual situation. The *Manley* case, however, does not argue an arbitrary restriction of the *Ferry* case to civil liability, but may be regarded as turning on the improbability that the legislature actually intended to impose a felony penalty for vicarious liability without fault, in view of its extreme harshness. Cf. Sayre, *Criminal Responsibility for the Acts of Another* (1930), 43 Harv. L. Rev. 689. In the instant case there can be no doubt that Congress intended to come as close to penalizing possession as its conception of its power under the commerce clause would let it.

of federal legislation phrased in the direct terms of making possession as such a substantive federal crime: "* * * it should be noted that in so far as 'possession' of weapons is referred to, it is a matter within the power of the states and not the Federal Government." But the Committee proposed through draftsmanship to achieve, as nearly as it thought constitutionally possible, the effect of operating on possession, for it recommended passage of the statute on the ground that its effect would be "to *take firearms from the possession* of the criminal and fugitive from justice;" and that it "is designed to prevent the crook and gangster, racketeer and fugitive from justice from being able to *purchase or in any way come in contact with* firearms of any kind or with *ammunition* for firearms." (S. Rep. No. 1189, 75th Cong., 1st Sess., pp. 32–33, italics supplied.) In reporting the bill favorably both Senate committees, similarly, stated the hope that it "will eliminate the gun from the crooks' hands" (S. Rep. No. 997, 74th Cong., 1st Sess., p. 2; S. Rep. No. 82, 75th Cong., 1st Sess., p. 2).

The power to prohibit even intrastate possession or acquisition rests here on a well-founded congressional judgment of a probable dangerous interstate movement of the men themselves, "a reasonable fear upon the part of Congress" that the intrastate act of possession will "probably and more or less constantly" form part of a pattern

which has a deleterious interstate effect. *Stafford v. Wallace*, 258 U. S. 495, 521. This judgment of potential interstate crime on the part of ex-convict possessors of guns is in turn deeply rooted in the facts. The generally high correlation between gun possession and tendency to crimes of violence is well known from recidivism statistics.[29] More particularly as to interstate movement in crimes of violence involving guns, the hearings before the Special Committee dealt extensively with the problem of the roving gunman, his transit from state to state, his tendency to use one state as a base of operation for crimes committed in another, and the inability of the state of commission to cope with him; and the witnesses who brought these situations to the Committee's attention all recommended rigid federal firearms control.[30] This testimony on successful criminals is confirmed by statistics on unsuccessful criminals, showing that possessors of guns move from state to state far more readily

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[29] See e. g. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* (First Quarterly Bulletin 1935), table 20; (1940), table 100.

[30] Hearings, Subcommittee of S. Committee on Commerce, 73rd Cong., 2nd Sess. (S. Res. 74) pp. 220 (cf. 228), 261, 276 (cf. 281), 334, 337-338 (cf. 339-340). Summarizing, the committee reported: "One fact outstanding in all the hearings was that practically all witnesses testifying were of one mind—that some sort of Federal control of firearms is necessary." S. Rep. No. 1189, 75th Cong., 1st Sess., p. 32.

than the remainder even of the criminal population.[4]

Since the explicit overruling of *Hammer* v. *Dagenhart*, 247 U. S. 251, by *United States* v. *Darby*, 312 U. S. 100, 115, there is no longer any doubt that the multiform power of Congress to legislate on intrastate subject matter to the extent necessary or even desirable to effectuate control of an interstate traffic includes prohibition of intrastate acts deemed preparatory to probable interstate movement. See also *Thornton* v. *United States*, 271

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[4] Department of Commerce, Bureau of the Census, *The Prisoner's Antecedents* (1929), pp. 11–17, 54–58, covering federal and state commitments for the first six months of 1923. Since the period antedates that of the rise of notorious interstate gangsterism the correlations would probably be higher for later years. (1) On a mere residence basis the figures merely indicate the general criminal tendency to roam: 28.3% (4,226 out of 14,926) of the male offenders of all kinds tabulated were non-resident of the immediate locality of commission of the crime; while the inconclusively higher figure of 32.4% (36 out of 111) represented nonresidents convicted for carrying concealed weapons and other minor gun crimes. (2) But when the basis of comparison shifted to distinguish the men who had recently come from outside the state, the comparative figure for minor gun crimes ran much higher; while only 5.1% (848 out of 16,513) of all male offenders had been in the state less than one month at the time of the offense, 13.8% (16 out of 116)—between two and three times as high a proportion—of the gun offenders had been within the state less than a month. For *no other crime* comprised in the 5.1% average was the recent arrival figure as high as the 13.8 figure for gun crimes. (3) These results are paralleled, although from a much smaller sampling, by the comparison between recent arrival in county and in state, i. e.,

U. S. 414, 424; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601; *Wickard* v. *Filburn*, decided November 9, 1942, No. 59, this term.

A congressional prohibition of the possession of guns by people of demonstrated tendency to violent crime is thus a proper exercise of the commerce power not merely over the gun in past transit from Connecticut to Michigan but over the gunman in prospective transit from Michigan to some other state, based upon the judgment, supported by the record before the Special Committee and confirmed by the statistics, that it is probable that as a member of the gunman class he will so move. If gunmen operated in plain sight, from known addresses and with regular methods, some action short of the prohibitory presumption might be sufficient to control them in the interest of destination states. But the fugitive and clandestine nature of the traffic requires as it justifies the stringency of the control method from the viewpoint both of the commerce clause and of substantive due process. Cf. *Hess* v. *Pawloski*, 274 U. S. 352, and *Carroll* v. *United*

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transient gun carriers tend to come from without the state rather than merely from without the county, to a greater extent than other transient criminals; while of all the offenders who had been within the county less than a month 51.5% (868 out of 1685) had likewise been within the state for less than a month, this figure rises to 84.2% (16 out of 19) in the case of gun offenders who had been within both state and county less than a month, and here too the figure for gun crime is higher than that for any other crime in the total.

States, 267 U. S. 132, for a similar approach in related constitutional arenas. The propriety of special treatment to meet the special problems of firearms is well recognized in the law. See Inbau, *Firearms and Legal Doctrine* (1933) 7 Tulane L. Rev. 528. We submit that the presumption of section 2 (f) does not offend the due process clause, because it is something less than a flat prohibition of possession of guns and ammunition by ex-convicts, and a flat prohibition would be an appropriate preventative against movement of guns in commerce on the part of a class deemed by Congress particularly likely so to move them to the harm of the destination states. *Brooks* v. *United States*, 267 U. S. 432, 437.

B. THE PRESUMPTION OF TIME

The court below correctly construed the presumption of Section 2 (f) as going to the time as well as the manner of receipt,[*] but held it invalid

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[*] The statute as a whole is clearly intended to apply to guns already in existence. If not, the narrow exemption of section 4, for "antique . . firearms . . . possessed and held as curios or museum pieces," would be meaningless. Cf. *United States* v. *Scharton*, 285 U. S. 518. Additional technical warrant for the construction resides in the phrase "in violation of this Act," which appears in the presumption of both 2 (f) and 2 (i). Since a receipt before the effective date of the statute would not be a violation, the phrase itself imports a receipt subsequent. The absurd effect of a contrary construction is particularly striking under the obliteration clause, section 2 (i). If the serial number be removed from a gun of a standard model in production both

as unreasonable, particularly in view of the age of the gun in the case, upwards of twenty years old yet found on the respondent only a little more than three years after the effective date of the statute. It may be that if the presumption of receipt subsequent to the effective date must stand or fall in terms of naked probability as to date of acquisition, the presumption is indefensible as to guns in existence for a substantially longer period before than after the

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before and after the Act, it will ordinarily be impossible to determine its date of manufacture. The possessor of an obliterated gun could almost always assert without danger of contradiction that he acquired the gun before, whereupon the very act of obliteration which is a condition of the crime becomes a perfect defense to the crime, absent presumption, for the prosecution would be without proof.

The Jones-Miller Act, in the form in which it was sustained in *Yee Hem* v. *United States*, 268 U. S. 178, carried an explicit four-year time presumption. However, no inference is to be drawn that Congress' failure to use such language here indicates that it intended no time presumption, for that provision was not in the original Jones-Miller Act of February 9, 1909, 35 Stat. 614, but was added in the revision of January 17, 1914, to meet the special problem of fraudulently repackaging subsequently imported opium in containers stamped to show earlier importation. H. Rep. No. 24, 63rd Cong., 1st Sess. Indeed the time provision now appears in the Code in the simple and unspecific language, "contrary to law." 21 U. S. C. sec. 181.

See *White* v. *United States*, 16 F. (2d) 870, 872 (C. C. A. 9), certiorari denied, 274 U. S. 745, presuming time from possession under the parallel provisions of section 8 of the Harrison Act, 38 Stat. 789, Internal Revenue Code, Sec. 3224, under which unregistered possession is "presumptive evidence" of "a violation of this section." The same application of the

effective date. But as we pointed out in connection with the presumption of interstate acquisition, speculations of probability do not control.

First.—The presumption as to time of acquisition is supported by the second and third grounds upon which we supported the presumption of commerce, discussed above, pp. 26–38. We submit that for the reasons there stated the presumption as to time of acquisition is valid.

Second.—Even if the presumption of time of acquisition would be invalid standing alone, its validity is supported by its function as ancillary to the enforcement of the presumption of manner of acquisition. The ordinary impossibility of distinguishing between prior and subsequent acquisition except through evidence supplied by the acquiror, which we have already noted as a construction problem,[33] has constitutional operation as well. It leaves a gap in the effectiveness of the presumption of manner of acquisition which Congress had to fill to effectuate that presumption, and

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presumption is now made on the parallel problem of venue in purchase cases under the Harrison Act, *Casey* v. *United States*, 20 F. (2d) 752, 753–754 (C. C. A. 9), affirmed, 276 U. S. 413; *Killian* v. *United States*, 29 F. (2d) 455, 456 (App. D. C.); *Acuna* v. *United States*, 74 F. (2d) 359, 360, (C. C. A. 5); *Mullaney* v. *United States*, 82 F. (2d) 638, 641, (C. C. A. 9), although the older cases were to the contrary, *Brightman* v. *United States*, 7 F. (2d) 532 (C. C. A. 8); *Cain* v. *United States*, 12 F. (2d) 580 (C. C. A. 8); *Hood* v. *United States*, 14 F. (2d) 925 (C. C. A. 8); *De Moss* v. *United States*, 14 F. (2d) 1021 (C. C. A. 7).

[33] See footnote 32, supra.

Congress had the power to fill it by means which might not be otherwise valid. This conception of "the recognized need of drafting a workable statute," *United States* v. *Darby*, 312 U. S. 100, 118, has constant application to what Mr. Justice Holmes, dissenting, in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241, termed the "penumbra" of legislative power. In the *Darby* case it sustained as an exercise of the commerce power the record-keeping requirements of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. Sec. 201, as applied to records of goods which might never enter interstate commerce and transactions which were themselves entirely intrastate, on the ground that:

> Congress * * * may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. * * * 312 U. S. 100, 125.

Such supplementary sanctions, penalizing otherwise unreachable activity which causes confusion or otherwise hinders enforcement of legislation against acts clearly within legislative reach, are uniformly held valid. *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192, is probably the leading example. See also *Brolan* v. *United States*, 236 U. S. 216, sustaining section 2 of the Jones-Miller Act (35 Stat. 614, 21 U. S. C. Sec. 174), presuming unlawful concealment of imported opium from

possession, notwithstanding that the opium had come to rest within a state; *Silz* v. *Hesterberg*, 211 U. S. 31, sustaining a state statute forbidding possession of game during the closed season, as applied to game lawfully taken elsewhere and imported into the state; *McDermott* v. *Wisconsin*, 228 U. S. 115, sustaining the application of the old Pure Food and Drugs Act of 1906, 34 Stat. 768, to forbid the removal of federal labels and the substitution of state labels after the completion of the interstate journey; *United States* v. *Ury*, 106 F. (2d) 28 (C. C. A. 2), sustaining customs law provisions forbidding removal of origin marks from imported goods although the goods had come to rest in a state; *Selzman* v. *United States*, 268 U. S. 466, sustaining Prohibition regulations requiring the labelling of unpotable denatured alcohol as within the power of Congress over potable alcohol; *Nigro* v. *United States*, 276 U. S. 332, sustaining features of the Harrison Narcotics Act, a tax statute, applied to persons who were themselves under no liability for tax. So here, the requirement, that one who claims exemption as a prior transactor take affirmative steps to furnish adequate identification of the prior transaction, is proper to assure that no subsequent transaction will escape under the guise of being prior. The additional presumption is validly imposed "to obstruct the successful accomplishment of the main crime." *Nigro* v. *United States*, 276 U. S. 332, 344.

C. THE PRESUMPTION OPERATES NO MORE ONEROUSLY THAN WOULD THE PRESUMPTION OF CONSTITUTIONALITY IF THE STATUTE DIRECTLY PENALIZED POSSESSION

The attack on the validity of the presumption clause is based on the due process clause of the Fifth Amendment. Accordingly, the test to be applied in determining the validity of the presumption clause is whether its effect was to deprive defendant of a fair trial.[*] As the issue turns on the fairness of the effect of the presumption, the standards to be applied are abstract unless they be given recognizable form by comparison with some everyday practices of the law. And in making this comparison, it must be borne in mind that where this constitutional limitation is invoked, a statute is to be judged by its substance, not by its form (*Crowell* v. *Benson*, 285 U. S. 22, 53).

Here the presumption arose when the Government proved beyond a reasonable doubt that the defendant possessed a firearm and ammunition. The effect of the presumption at that point was to compel defendant to come forward, as in an affirmative defense, with evidence to show either (1) that he had not received the firearm and the ammunition in interstate commerce, or (2) that he had not received the firearm and ammunition subsequent to the enactment of the statute. Defendant came

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[*] *Lisenba* v. *California*, 314 U. S. 219, 236; *Snyder* v. *Massachusetts*, 291 U. S. 97, 107–108.

forward with evidence directed to the first of these points, evidence which the jury disbelieved.

The situation is comparable to that which would prevail if Congress should declare that possession of a firearm or of ammunition by an ex-convict shall be a federal offense. Proof beyond a reasonable doubt that a firearm was in the possession of an ex-convict would satisfy the Government's case. To avoid conviction, the defendant would have to show that the statute could not constitutionally apply to him.

This conclusion follows from repeated decisions of this Court, which were summarized by Mr. Justice Brandeis in *Heald* v. *District of Columbia*, 259 U. S. 114, 123, as follows:

> It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the

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The discussion above, pp. 34-38, shows that Congress has power to enact such a statute. However, for the purposes of this comparison, we assume (1) that Congress might not have power to prohibit possession resulting from an intrastate acquisition, and (2) that the basis exists for concluding that Congress wished the statute to be operative as to possessions resulting from interstate acquisitions even if it could not constitutionally apply to possessions resulting from intrastate acquisitions.

> statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held. * * *

This rule has been applied to defendants in federal criminal cases (*United States* v. *Miller*, 307 U. S. 174; *United States* v. *Carolene Products Co.*, 304 U. S. 144), in state criminal cases (*Hatch* v. *Reardon*, 204 U. S. 152; *Williams* v. *Walsh*, 222 U. S. 415; *Radice* v. *New York*, 264 U. S. 292), and in both civil and criminal cases where the defendant's claim of constitutional immunity was based on the commerce clause (*Hatch* v. *Reardon*, *supra*; *Williams* v. *Walsh*, *supra*; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642; *Detroit Bridge Co.* v. *Tax Board*, 287 U. S. 295).

Perhaps the closest parallel among the foregoing cases is *Williams* v. *Walsh*, *supra*, where a defendant was convicted of selling black powder in violation of a Kansas statute. In a habeas corpus proceeding testing the validity of his conviction, he contended that the statute was unconstitutional because it applied to interstate sales of powder as well as to intrastate sales. The court refused to consider that objection, because while the defendant had alleged that his powder had been sold in interstate commerce he had not proved it and therefore was not one to whom the statute could not constitutionally apply.[*] Thus the conclusion

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[*] There is no suggestion in this case or elsewhere that a different rule would have been applied had the de-

seems proper that where a defendant in a criminal case contends that he cannot be convicted because the statute involved is invalid under the commerce clause, he must show that his particular case is one to which the statute cannot constitutionally apply.[7]

The burden on such a defendant is well described by the language of Mr. Chief Justice Hughes in *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, where, speaking in terms of a presumption of constitutionality, he said that that presumption "is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. * * * one who assails [a statute] * * * must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the" statute is invalid. This

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fendant contested the validity of his conviction by an appeal instead of by writ of habeas corpus. The same rule has been applied where a constitutional objection was raised on appeal from a conviction. In *Radice* v. *New York*, 264 U. S. 292, the defendant actually introduced evidence as part of his case in an effort to sustain factually his contention of unconstitutionality. On appeal from conviction, this Court held he had not sustained his burden. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, and *United States* v. *Miller*, 307 U. S. 174, reversing the quashing of indictments where the Court held the defendant must show facts to establish that the statute is invalid as to him. The inference is that he must do it as part of his defense.

[7] This conclusion is equally supported by *Hatch* v. *Reardon*, *supra*, also a habeas corpus case raising the commerce clause as a bar to conviction.

burden was similarly described by Mr. Justice Stone in *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 283, where he spoke of "the burden which rests on him to overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts." That this burden is not always easily met is shown by *Radice* v. *New York*, *supra*, a criminal case where the defendant actually introduced evidence to rebut "the presumption of facts supporting constitutionality," and his evidence was held insufficient.*

In the hypothetical case used for this comparison, the prosecution's case would not compel it to establish facts from which the defendant could argue that he acquired the objects in intrastate commerce. Defendant would have the burden of establishing facts to support such an argument. Likewise, in *Hatch* v. *Reardon*, *supra*, and *Williams* v. *Walsh*, *supra*, the prosecution's cases did not require them to establish facts from which it could be seen whether the defendants' acts had been in interstate commerce. In *Hatch* v. *Reardon* the prosecution showed merely that defendant had transferred title in New York to shares of stock without payment of the state stamp tax. The de-

* The evidence was offered to show that a state regulatory statute was arbitrary and unreasonable. Doubtless the burden of making such a showing is somewhat heavier than the burden of showing that one's acts were in interstate or intrastate commerce, as the case may be.

fendant was convicted because he failed to show facts to sustain his contention that the stock had been sold in interstate commerce. And the same situation prevailed in *Williams* v. *Walsh*, where the prosecution showed merely that defendant had delivered powder to someone in Kansas. Because defendant failed to bring forward evidence to sustain his allegation that the delivery was part of an interstate transaction, the conviction was upheld.

The foregoing discussion shows that the practical effect of the statutory presumption herein involved is the same as would be the practical effect of the presumption of constitutionality if the substantive provisions of the statute operated directly on possession. The showing required of the prosecution is the same in each case. The showing required of the defendant is the same in each case. In one case, these consequences flow from the statutory presumption. In the other case, they flow from the Constitution itself.[*]

Surely it cannot be that the statutory presumption has the effect of depriving defendant of a fair trial, of denying him due process, when it has precisely the same effect as the presumption of constitutionality would have if the substantive provisions of the statute directly penalized possession.

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[*] The discussion in the text has related expressly only to the presumption regarding interstate commerce. The presumption regarding the time of acquisition likewise has support in presumption of constitutionality cases. See *Stockholders* v. *Sterling*, 300 U. S. 175, 184.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below should be reversed.

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MARCH, 1943

APPENDIX

AN ACT

To regulate commerce in firearms

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—

(1) The term "person" includes an individual, partnership, association, or corporation.

(2) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia.

(3) The term "firearm" means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.

(4) The term "manufacturer" means any person engaged in the manufacture or importation of firearms, or ammunition or cartridge cases, primers, bullets, or propellent powder for purposes

of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this Act.

(5) The term "dealer" means any person engaged in the business of selling firearms or ammunition or cartridge cases, primers, bullets, or propellent powder, at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breach[1] mechanisms to firearms, and the term "licensed dealer" means any such person licensed under the provisions of this Act.

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

(7) The term "fugitive from justice" means any person who has fled from any State, Territory, the District of Columbia, or possession of the United States to avoid prosecution for a crime of violence or to avoid giving testimony in any criminal proceeding.

(8) The term "ammunition" shall include all pistol or revolver ammunition except .22-caliber rimfire ammunition.[2]

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[1] So in original.

[2] By act of August 6, 1939, 53 Stat. 1222, the definition of ammunition was changed to read: "(8) The term 'ammunition' shall include only pistol or revolver ammunition. It shall not include shotgun shells, metallic ammunition suitable for use only in rifles or any .22 caliber rimfire ammunition."

SEC. 2. (a) It shall be unlawful for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this act, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce.

(b) It shall be unlawful for any person to receive any firearm or ammunition transported or shipped in interstate or foreign commerce in violation of subdivision (a) of this section, knowing or having reasonable cause to believe such firearms or ammunition to have been transported or shipped in violation of subdivision (a) of this section.

(c) It shall be unlawful for any licensed manufacturer or dealer to transport or ship any firearm in interstate or foreign commerce to any person other than a licensed manufacturer or dealer in any State the laws of which require that a license be obtained for the purchase of such firearm, unless such license is exhibited to such manufacturer or dealer by the prospective purchaser.

(d) It shall be unlawful for any person to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is under indictment or has been convicted in any court of the United States, the several States, Territories, possessions (including the Philippine Islands), or the District of Columbia of a crime of violence or is a fugitive from justice.

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a

crime of violence or who is a fugitive [1] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive [1] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this act.

(g) It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen.

(h) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any firearm or ammunition or to pledge or accept as security for a loan any firearm or ammunition moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen, knowing, or having reasonable cause to believe the same to have been stolen.

(i) It shall be unlawful for any person to transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been

[1] So in original.

removed, obliterated, or altered, and the possession of any such firearm shall be presumptive evidence that such firearm was transported, shipped, or received, as the case may be, by the possessor in violation of this Act.

SEC. 3. (a) Any manufacturer or dealer desiring a license to transport, ship, or receive firearms or ammunition in interstate or foreign commerce shall make application to the Secretary of the Treasury, who shall prescribe by rules and regulations the information to be contained in such application. The applicant shall, if a manufacturer, pay a fee of $25 per annum and, if a dealer, shall pay a fee of $1 per annum.

(b) Upon payment of the prescribed fee, the Secretary of the Treasury shall issue to such applicant a license which shall entitle the licensee to transport, ship, and receive firearms and ammunition in interstate and foreign commerce unless and until the license is suspended or revoked in accordance with the provisions of this Act: *Provided*, That no license shall be issued to any applicant within two years after the revocation of a previous license.

(c) Whenever any licensee is convicted of a violation of any of the provisions of this Act, it shall be the duty of the clerk of the court to notify the Secretary of the Treasury within forty-eight hours after such conviction and said Secretary shall revoke such license: *Provided*, That in the case of appeal from such conviction the licensee may furnish a bond in the amount of $1,000, and upon receipt of such bond acceptable to the Secretary of the Treasury he may permit

the licensee to continue business during the period of the appeal, or should the licensee refuse or neglect to furnish such bond, the Secretary of the Treasury shall suspend such license until he is notified by the clerk of the court of last appeal as to the final disposition of the case.

(d) Licensed dealers shall maintain such permanent records of importation, shipment, and other disposal of firearms and ammunition as the Secretary of the Treasury shall prescribe.

SEC. 4. The provisions of this Act shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm, or ammunition, sold or shipped to, or issued for use of, (1) the United States or any department, independent establishment, or agency thereof; (2) any State, Territory, or possession, or the District of Columbia, or any department, independent establishment, agency, or any political subdivision thereof; (3) any duly commissioned officer or agent of the United States, a State, Territory, or possession, or the District of Columbia, or any political subdivision thereof; (4) or to any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money and valuables; (5) or to any research laboratory designated by the Secretary of the Treasury: *Provided*, That such bank, public carriers, express, and armored-truck companies are granted exemption by the Secretary of the Treasury; nor to the transportation, shipment, or receipt of any antique or unserviceable firearms, or ammunition, possessed and held as curios or museum pieces: *Provided*, That noth-

ing herein contained shall be construed to prevent shipments of firearms and ammunition to institutions, organizations, or persons to whom such firearms and ammunition may be lawfully delivered by the Secretary of War, nor to prevent the transportation of such firearms and ammunition so delivered by their lawful possessors while they are engaged in military training or in competitions.

SEC. 5. Any person violating any of the provisions of this Act or any rules and regulations promulgated hereunder, or who makes any statement in applying for the license or exemption provided for in this Act, knowing such statement to be false, shall, upon conviction thereof, be fined not more than $2,000, or imprisoned for not more than five years, or both.

SEC. 6. This Act shall take effect thirty days after its enactment.

SEC. 7. The Secretary of the Treasury may prescribe such rules and regulations as he deems necessary to carry out the provisions of this Act.

SEC. 8. Should any section or subsection of this Act be declared unconstitutional, the remaining portion of the Act shall remain in full force and effect.

SEC. 9. This Act may be cited as the Federal Firearms Act.

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 636

UNITED STATES OF AMERICA,
Petitioner,
vs.
FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR FRANK DELIA

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BRIEF FOR FRANK DELIA

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 26-31) is reported in 131 F(2) 614.

JURISDICTION

Defendant accepts the statement of the United States as to jurisdiction.

QUESTIONS INVOLVED

1. Whether Section 2(f) of the Federal Firearms Act should be construed to prohibit

(a) receipt of firearms or ammunition, if at any time in the past they had moved in interstate commerce, or

(b) receipt of firearms or ammunition in the course of interstate commerce.

2. Whether the conviction should be set aside because defendant was tried upon the construction of Section 2(f) that defendant was guilty if the firearm and ammunition that he possessed had at any time in the past moved in interstate commerce.

3. Whether Section 2(f) of the Federal Firearms Act is constitutional as a valid regulation of interstate commerce under Article I, Section 8 or unconstitutional under the Tenth Amendment as an exercise of power reserved to the states.

4. Whether the trial court should have directed a verdict because the presumption was rebutted, there being no evidence of receipt in interstate commerce.

5. Whether the presumption clause of Section 2(f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

U. S. Constitution, Article I, Section 8, in pertinent part, provides:

> "The Congress shall have power to * * * regulate commence with foreign nations and among the several states * * *."

The Tenth Amendment in pertinent part provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 2(f) of the Federal Firearms Act of June 30, 1938, 52 Stat. 1250 (15 U. S. C., section 902(f) in pertinent part provides as follows:

> "It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was * * * received, * * * by such person in violation of this Act."

STATEMENT

Defendant accepts the statement of the United States in its brief.

SUMMARY OF ARGUMENT

I. This case was tried in the district court upon the construction of Section 2(f) of the Federal Firearms Act to prohibit receipt, by a person previously convicted of a crime of violence, of a firearm or ammunition if such articles had at any time *in the past* been the subject of interstate commerce. This construction of Section 2(f) is demonstrated not only by the language of Section 2(f), particularly as compared to other sections of the act, but also by the language of the indictment, the opening statement of the U. S. attorney to the jury, the proofs introduced by the U. S. attorney, and the court's charge to the jury.

If Section 2(f) is construed otherwise the conviction must be reversed because Delia was tried upon the foregoing construction of the statute.

II. To prohibit receipt of a firearm or ammunition which had at any time in the past been the subject of interstate commerce, is unconstitutional because it is not a valid regulation of commerce under Article I, Section 8, but an exercise of police power reserved to the states under the tenth amendment.

Firearms and ammunition may be lawfully and legally transported from one state to another and come to rest within the state. Firearms and ammunition were at rest within the various states when the act became effective. Congress had no power to regulate the subsequent possession of articles after they had come to rest within a state, such regulation having no relationship to their prior interstate transportation.

III. If subsection 2(f) is construed to prohibit receipt only in the course of interstate commerce as was done

by the Circuit Court of Appeals, the trial court should have directed a verdict for defendant because there was no evidence to go to the jury. The presumption is only a *prima facia* presumption and goes only to the order of proof. The trial court agreed that the presumption had been rebutted. There was no other proof of receipt in interstate commerce. The trial court denied the motion for directed verdict because of the construction of the statute that defendant was guilty if at any time *in the past* the articles had been transported in interstate commerce.

IV. The Circuit Court of Appeals construed Section 2(f) to prohibit receipt of a firearm or ammunition only in the course of interstate commerce, but held that the presumption contained in Section 2(f) to the effect that such receipt in interstate commerce should be presumed from the fact of possession was invalid. "There must be some logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact. If such connection does not exist it follows obviously that a defendant is exposed to conviction upon evidence which has no probative value; or, put in another way, upon no evidence at all. It follows further that if at the close of the Government's proof the accused seeks to defend himself, the burden is cast upon him of explaining a situation which up to that point had no incriminating tendency or effect" (R. 30).

A. The Government concedes that possession does not raise an inference that ammunition was received in interstate commerce or that a firearm was received subsequent to the effective date of the act. Neither does possession raise an inference that a firearm was received by a particular defendant in the course of interstate commerce at any time. The fact that acquisition of certain types of

firearms by persons previously convicted of violence is prohibited by both Federal and State law does not raise a presumption that such articles were obtained in violation of Federal law rather than in violation of state law. There is indeed a probability that the articles were received in intrastate commerce rather than interstate because many states do not have firearms control acts and others prohibit only certain types of firearms.

B. Mere unavailability of proof to the Government does not sustain the validity of a presumption in the absence of a rational connection between the facts presumed and that proven. In any event it will not be imposed where it may result in a "probability of injustice and preponderating hardship to the defendant" which would result if defendant were required to testify because the trier of the fact is likely to disbelieve a defendant who had been previously convicted of a crime.

C. Congress does not have the power to prohibit all possession of firearms as a regulation of probably subsequent interstate transportation. If it had such power it did not intend Section 2(f) to constitute an exercise of such power. Section 2(f), together with the entire Federal Firearms Act is predicated upon a regulation of present interstate commerce and cannot be construed otherwise.

D. and E. The defendant is a person who is sufficiently injured to be entitled to question the constitutionality of the Act. Taken in its entirety the presumption contained in Section 2(f) deprives defendant of a fair trial.

ARGUMENT

I.

CONSTRUCTION OF THE STATUTE

Section 2(f) may be construed either: (1) to prohibit receipt of a firearm or ammunition in the course of interstate commerce; or (2) to prohibit receipt of a firearm or ammunition which at any time in the past had moved in interstate commerce.

The Circuit Court of Appeals construed the statute to prohibit receipt of a firearm or ammunition in the course of interstate commerce, but held the statute unconstitutional because of the fact that interstate commerce was presumed from the mere fact of possession. This decision, of course, made unnecessary the consideration of other issues raised by the defendant.

However, the case was not tried in the District Court upon this construction of the statute, but was tried, and we believe correctly, on the theory that Delia was guilty if the firearm and ammunition contained therein had at any time in the past, even prior to the effective date of the act, been the subject of interstate commerce.

That such a meaning is what Congress intended appears from the language of the statute, which makes it unlawful "to receive any firearm or ammunition *which has been* shipped or transported in interstate or foreign commerce." The words "which has been" denotes a past transaction already completed.

Had Congress intended to describe the article as one received *in the course of* interstate commerce instead of one shipped or transported in interstate commerce *in the past*, it could have omitted after the word "ammunition" the

three words "which has been." The provision would then make it unlawful "to receive any firearm or ammunition shipped or transported in interstate or foreign commerce."

Furthermore, if it were not the intent of Congress to prohibit receipt of a firearm or ammunition which at any time in the past had moved in interstate commerce, there appears to be no good reason for making two subsections out of the subject matter of subsection (e) and subsection (f). Subsection (e) makes it unlawful "to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition." It would have been a simple matter to add the word "receive" to the list of unlawful acts in this section. That Congress did not do this indicates that it intended to prohibit not only the receipt of a firearm or ammunition *in* interstate or foreign commerce, but also receipt of an article which at any time in the past had moved in interstate commerce.

Whether or not this construction is correct, the case was tried in the District Court upon such a construction.

(a) In the indictment, the Government charged that "Delia * * * did * * * *receive and possess* a firearm which firearm had *therefore* been shipped and transported in interstate commerce" (R. 5). The corelated use of the words "receive and possess," and the use of the word "therefore" all indicate the conception on the part of the U. S. Attorney in drafting the indictment that Delia was guilty if the gun that he possessed had at any time *in the past* been the subject of interstate commerce.

(b) This was also the construction of the U. S. attorney who tried the case, who in his opening statement explained the nature of the offense to the jury, using the word "previously" as equivalent to the word "therefore" of the indictment. "Frank Delia stands charged with *possession*,

with *receiving and possessing* a * * * revolver * * *, which revolver had *previously* been shipped in interstate commerce * * *" (R. 7, 8).

(c) That the U. S. attorney so construed the statute is further indicated by the fact that he subpoenaed experts and affirmatively introduced proof that the firearms and ammunition had sometime *in the past* been the subject of interstate commerce, by proving that the firearm and ammunition were originally manufactured outside of the State of Michigan. This evidence had absolutely no probative value whatsoever that Delia received the article *in the course* of interstate commerce. On the other hand, the evidence was conclusive that the article must have sometime *in the past* been the subject of interstate commerce.

(d) It is clear that the trial court also so construed the statute concerning the question of interstate commerce. The court charged:

> "* * * The theory of the government is that this *gun or revolver was not manufactured in Michigan; therefore someone brought it into Michigan*, either in shipment, or otherwise, brought it in; and the theory of the government is that it was in interstate commerce from the state where it was made, and was *subsequently* found upon this day in question in Detroit, Michigan, in the hands of the defendant, together with the cartridges which were contained in the revolver" (R. 17).

The foregoing language clearly demonstrates the court's construction of the statute as establishing guilt if a firearm or ammunition "previously" in interstate commerce were "subsequently" "received or possessed" by defendant.

The significant language of the indictment "*receive and possess* • • • firearm which had *theretofore* been shipped and transported in interstate commerce" (R. 5) is also used by the court in a later portion of the charge:

> "So, the first question for you to determine is this: Has the government, under the rules of law which I have given you, established the fact that he was a person, the defendant, who had been previously convicted of a crime of violence; and that he did unlawfully, wilfully, feloniously and knowingly, *receive and possess* the firearm which has been described here, and the cartridges, which firearm had *theretofore* been shipped and transported in interstate commerce?" (R. 20)

The court further charged the jury that the Government did not have to rely upon the presumption contained in the statute to establish interstate commerce because such commerce had in fact been proven.

> "And if he received it from someone, whether he knew it was in interstate commerce or not, would make no difference, because the government claims to have proven here, and *the evidence appears to be uncontradicted, that this revolver was involved in interstate commerce;* it came from one state into the state of Michigan. And it claims that by reason of the fact that this revolver was never manufactured in Michigan, but was manufactured in another state" (R. 20).

The clear inference of the court is that the government's proof of interstate commerce was conclusive. The proof, of course, was only that the revolver had some time *in the past* been in interstate commerce.

(e) In the last paragraph of the charge, the court instructed the jury that the presumption had "little weight" (R. 22). This was given in response to defendant's request to charge that the presumption had "no weight," and was understood by counsel for defendant and by the court to be substantially the same as this request and was without doubt so considered by the jury. If the presumption had no weight, the case could have been submitted to the jury only if there was other evidence to affirmatively prove interstate commerce. There was such evidence, which, as the court said, "appears to be uncontradicted" (R. 20). However, this evidence proved only that the articles had sometime *in the past* been the subject of interstate commerce.

The court charged the jury to acquit defendant, if they believed his testimony that he picked up the revolver in self-defense and for his own protection after having been dropped by one of several persons who attacked him, on the premise that such facts, if true, would show that he had no connection with the revolver and not on the premise that such facts would negative the presumption of interstate commerce. The court clearly charged that the government had proved the requisite interstate commerce by "uncontradicted evidence" (R. 20). It is clear that the court considered defendant's defense as going only to the question of his connection to the revolver not to interstate commerce.

(f) Had the case been tried on the construction of the statute as prohibiting only receipt in the course of interstate commerce, it would have been necessary for the jury to find that the defendant received the firearm *subsequent* to the effective date of the Act. This could have been based upon affirmative proof upon the presumption. The record discloses no evidence and no charge by the court of a

presumption, of this requirement. From this we must conclude that defendant was not convicted of receiving a firearm and ammunition in interstate commerce subsequent to the effective date of the act but was convicted of receiving and possessing a firearm and ammunition which had at some time in the past been the subject of interstate commerce

If this court should disagree with the construction of the trial court and agree with the narrow construction of the Circuit Court, Delia should nevertheless be freed because he was not tried upon such a construction of the statute.

It was not necessary for defendant to except to the charge of the court or to make any request for any further charge beyond that given. Counsel for Delia agreed with the interpretation of the statute by the trial court, but urged before that court and submits to this court that so construed the statute is unconstitutional.

II.

SECTION 2(f) IS A REGULATION OF INTRASTATE COMMERCE AND VIOLATES THE TENTH AMENDMENT

Section 2(f) as construed by the trial court is not a valid regulation of interstate commerce. It is an exercise of the police power reserved to the states. It regulates the possession of articles lawfully within a state and completely at rest therein. The fact that the articles were at some time in the past the subject of interstate commerce does not serve to make them subject to federal regulation.

Firearms and ammunition may be manufactured in one state and legally and lawfully transported to another.

Having been so transported, they come to rest therein. They may thereafter be sold in retail establishments, purchased, possessed, sold and resold by countless persons. They may be acquired by purchase, gift or inheritance. They may be obtained from regular dealers or from private persons.

The Federal Government has no right to regulate receipt or possession of such articles after they have come to rest within a state. This regulation of firearms and ammunition has no relation whatsoever to the previous interstate transportation.

If such a regulation were valid, the federal government could take over all of the police power of the state. For example, it could punish the theft of any article which had ever been manufactured outside of the state in which it was stolen. Without going into further examples, the federal government could regulate in the minutest detail the use of all articles brought into the state and completely at rest therein.

The case of *Keller v. United States*, reported in 213 U. S. 138, arose under "An act to regulate the immigration of aliens into the United States." The defendant had been found guilty under that part of the act which punished:

> "* * * whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, * * *" 213 U. S. 139.

The court held: [in the case at bar there is no time limit whatsoever]

"The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisdiction thereover solely with the State? Undoubtedly, as held, 'Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law; * * *.'

"* * * While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress" (213 U. S. 143).

"As to the suggestion that Congress has power to punish one *assisting in the importation* of a prostitute, it is enough to say that the statute does not include such a charge; * * * In view of those facts the question of the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial." (213 U. S. 147, 148).

Under the doctrine of this case, Congress might regulate the interstate transportation of firearms and ammunition and might prohibit their receipt in interstate commerce by a class such as defendant, but it may not regulate subsequent possession of these articles after they have come to rest within a state.

The Keller case has been cited in subsequent federal decisions to illustrate exactly the point we make. In the

case of *Steinfeldt v. United States*, 209 Fed. 879, the court held valid an act making it a crime for one to receive, conceal, buy or sell opium knowing it to have been imported contrary to law as a valid exercise of the power of Congress to regulate foreign commerce since the acts therein prohibited, encourage and induce the unlawful importation.

> "* * * To receive or conceal opium after it is imported and with knowledge of its illegal importation, is in effect to *participate* in the illegal importation. It is an act which encourages, induces, and supplements the act of the *illegal importer* * * *" (209 Fed. 880).
>
> "The case is distinguishable from Keller v. United States * * *, *the distinction to be observed between that case and this is the fact that the harboring which was forbidden by law had nothing to do with the unlawful importation, was entirely disassociated therefrom, and was purely a regulation as to dealings by persons who, in the matter involved, were subject only to state regulation* * * *." (Italics supplied.)

In the case of *Brolan v. United States*, 236 U. S. 216, the court upheld the power of Congress to prohibit possession of opium known to have been illegally imported. It distinguished *Keller v. United States* relied upon by the defendant, pointing out that the White Slave Act involved in that case:

> "* * * punished not the harboring of persons for immoral purposes who had been brought into the United States in violation of the prohibition against importation, but its provisions also embraced the harboring of persons for immoral pur-

> poses if they were aliens even though they had come into the United States lawfully. The basis upon which the Keller case proceeded was so manifest that Congress amended the act by making the penal clause which was held unconstitutional, applicable only to those immoral aliens who had come into the United States in violation of the prohibitions of the act." (236 U. S. 221, 222).

It should be noted that the Federal Firearms Act is not an attempt to control the subsequent possession of a firearm, which has been previously shipped in interstate commerce contrary to law. No question of "contrabrand of commerce" is involved. The statute regulates subsequent possession of firearms and ammunition which has been lawfully and legally imported into a state. The act does not prohibit all interstate commerce in firearms and ammunition. Such commerce was and is legal. The statute prohibits the subsequent possession of this lawful and legal commodity by a particular small class after it has come to rest within a state. If the revolver in question had been shipped in interstate commerce contrary to law, then its subsequent receipt or possession might be constitutionally prohibited under the doctrine of the opium and smuggling cases. Section 2(f) of the Federal Firearms Act does not prohibit possession based upon prior illegal transportation or attempt to prohibit possession of all firearms. The revolver was manufactured between 1900 and 1920 in the State of Massachusetts. It could have been brought into Michigan legally and could have been innumerable times legally transferred within the state. The subsequent receipt or possession by defendant of this revolver is in no wise related to its previous interstate shipment.

Articles heretofore shipped in interstate commerce which have come to rest within a state are not subject to federal regulation.

In the case of *Schechter Corp. v. United States*, 295 U. S. 495, it was held:

> "Act is unconstitutional because it exceeds the power of Congress to regulate interstate commerce and invades the power reserved exclusively to the States" (Syllabus 4).
>
> "So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states" (295 U. S. 495).

We submit that the act is unconstitutional because it is not a regulation of interstate commerce and is an exercise of police power exclusively reserved to the states.

The case was tried in the district court upon the broad construction of the statute, that guilt was established if the defendant possessed a firearm or ammunition which had at any time in the past been the subject of interstate commerce. So construed, the section is unconstitutional, because not a proper regulation of interstate commerce.

We again call attention to the fact that should this court reject this construction of Subsection 2(f), and agree with the Circuit Court of Appeals that the act applied only to those who actually receive the articles in the course of interstate commerce, Delia must be freed because he was not tried on such a construction of the statute.

III.

IF SUBSECTION 2(f) IS CONSTRUED TO PROHIBIT RECEIPT ONLY IN THE COURSE OF INTERSTATE COMMERCE, THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT BECAUSE THERE WAS NO EVIDENCE TO GO TO THE JURY

The remainder of our brief is devoted to the effect and validity of the presumption predicated upon the narrow construction placed upon subsection 2(f) by the Circuit Court of Appeals and contended for as correct by the government in its brief before this court. If the statute is so construed, defendant was guilty only if he received the firearm and ammunition in the course of interstate commerce. It is stipulated that there was no evidence whatsoever of this fact (agreed statement par. 5, R. 7). The Government relies entirely upon the *prima facie* or presumptive evidence to prove receipt in the course of interstate commerce.

> "Nevertheless, it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the *opponent does* offer evidence to the contrary sufficient to satisfy the judge's requirement of some evidence, the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule." *Wigmore on Evidence*, 3rd Ed., Sec. 2491, Vol. IX, p. 289.

> "PRESUMPTON AS EVIDENCE.—The effect of a presumption is to invoke a rule of law which compels the jury to return a verdict in accordance therewith, in the absence of any evidence to the con-

trary from the other side. If the opponent does present such evidence, then the presumption vanishes, and the jury may consider the proof free from any such rule. Thus, the presumption that death resulted from an accident or natural causes rather than from suicide, the presumption of due care or freedom from negligence, the presumption that an official or an official body charged with the performance of governmental duties acted honestly in his or its official duties, the presumption of good character in behalf of the defendant in a criminal prosecution, or the presumption of the relationship of master and servant existing between the owner of a car and the driver thereof when met by rebutting proof is not evidence and is not to be treated as such by the jury in arriving at a verdict. Such a presumption merely aids in establishing a *prima facie* case and has no probative effect when countervailing proof is given." *20 Am. Jur.* 170, Evidence, Sec. 166.

In the case of *Connecticut Mutual Life Ins. Co. v. Lanahan*, 112 Fed. (2nd) 375 (Circuit Court of Appeals, Sixth Circuit), it is stated:

> "The presumption against suicide is not to be treated as evidence and disappears when testimony is offered to rebut it." (Syllabus 4.)

In the case at bar the defendant rebutted the presumption by direct testimony that the articles were not received by him in interstate commerce. After this testimony the statutory presumption sufficient to convict in the absence of testimony was gone and the jury was left to weigh the evidence entirely free of the statutory presumption. The burden of proof remained with the government. It is

agreed that there was *no evidence* whatsoever that defendant had shipped, transported or received the articles in interstate commerce. The court should have directed a verdict of not guilty for the defendant.

It was our position in the trial court and in the Circuit Court of Appeals that this *prima facie* or presumptive evidence, if it were valid, was completely rebutted when defendant came forward and introduced evidence tending to prove that he did not possess the articles within the meaning of the statute and did not receive them in the course of interstate commerce, and that the trial court should have directed a verdict for defendant.

It was unnecessary for the Circuit Court of Appeals to answer this question because of its determination that the presumption itself was invalid and it will, of course, be unnecessary for this court to do so if it affirms that decision. However, if this court should not agree that the presumption is invalid then it will be necessary to determine its effect. This problem is also discussed in point I of the brief for petitioner in the Tot case and is argued by the Government in its brief in that case.

We call to the court's attention that the trial court agreed with us that the presumption had been rebutted. The trial court denied the motion for a directed verdict only because of its construction of the statute that defendant was guilty if he possessed a firearm or ammunition which had at any time *in the past* been transported in interstate commerce. Concerning the presumption itself the trial court correctly charged the jury that the presumption had "little weight here because of the fact that the defendant has taken the stand in his own behalf and he denies the charges made in the indictment" (R. 22).

IV.

THE PRESUMPTION OF INTERSTATE COMMERCE BASED ON POSSESSION IS UNREASONABLE AND CONTRARY TO DUE PROCESS OF LAW

The presumption contained in Section 2(f) of the Federal Firearms Act that a person, previously convicted of a crime of violence, in possession of a firearm or ammunition received them in the course of interstate commerce subsequent to the effective date of the act, violates the Fifth Amendment, which provides that "no person shall be * * * deprived of life, liberty or property without due process of law. * * *"

The Circuit Court of Appeals so held, and we refer to its opinion (R. 26-31) for a concise statement of the argument and authorities to the effect that the presumption is invalid. We will confine our discussion largely to answering the arguments presented by the Government.

A. There is no rational connection between possession of firearms or ammunition, and its receipt in the course of interstate commerce subsequent to the effective date of the act.

Delia was convicted under two counts. Count 1 charged that he did receive and possess a firearm * * * (R. 5) and Count 2 charged that he did receive and possess * * * cartridges * * * (R. 5). He was given the maximum sentence of five years on each count to run consecutively, or a total of ten years.

The Government concedes that there is no rational connection between possession of *ammunition* and receiving it in the course of interstate commerce, and relies on other arguments to support the validity of this presumption (U. S. brief p. 30).

The Government also concedes that there is no rational connection between possession of either a firearm or ammunition and receipt *subsequent* to the effective date of the act, where the guns have been in existence for a substantially longer period before than after the act (U. S. brief p. 39). The Act became effective July 30, 1938. In the instant case the gun had been manufactured from 18 to 38 years before the effective date of the act and was found in Delia's possession only three years thereafter. In the *Tot* case the gun was manufactured 19 years before the act became effective and was found in Tot's possession only 50 days thereafter.

The government only contends that the presumption is valid under the rational connection test as to firearms, not ammunition, and as to receipt in interstate commerce in general, though not to such receipt subsequent to the effective date of the Act.

In support of this position the Government cites the practical difficulty of intrastate acquisition of guns by men like defendant, because of state statutes prohibiting such acquisition, and argues that for that reason it is probable that the firearm was obtained in interstate commerce. That is the substance of the argument. "Firearm" is defined in Section 1 of the Federal Firearms Act as "any weapon by whatever name known which is designed to expel a projectile or projectiles by the action of an explosive." However, Michigan law does not restrict in any manner the possession of firearms with a barrel of more than 30 inches (Mich. Statutes Annotated, Sec. 28.91. The presumption of interstate commerce, if valid, would operate as to all firearms regardless of the length of barrel.

Other states do not have any prohibitions against intrastate acquisition or possession (only 31 states have any

firearm control laws according to the Government's brief p. 19). Even a person previously convicted of a crime of violence could in such states legally acquire a firearm. On the other hand, for such a person to receive a firearm in interstate commerce would not only subject him to the penalty of the Federal Firearms Act, but would also subject the person from whom he received the firearm to such penalty. Nevertheless, if the presumption of receipt in interstate commerce is valid, it would also apply to persons in the states where firearms can be legally acquired by them.

It can hardly be presumed that persons previously convicted of a crime of violence would in such states receive a firearm from another state in violation of the laws of the United States, when the firearm could be lawfully and easily obtained by them within the state in intrastate commerce. The probabilities are that persons in such states would acquire guns there legally.

Receipt in interstate commerce is prohibited to persons previously convicted of a crime of violence in all states under Section 2(f) of the Federal Firearms Act. Section 2(a), prohibits any manufacturer or dealer, except those having a license, to ship or transport any gun or ammunition in interstate commerce; Sec. 2(c) prohibits licensed dealers to ship or transport to any person not having a State license in those states which require one; and Sec. 2(d) prohibits any person to ship or transport knowing or having reasonable cause to believe that the receipient has been previously convicted of a crime of violence. Where acquisition both interstate and intrastate is prohibited, there is no probability that the firearm was acquired in one manner rather than another, and, therefore, there should be no presumption of interstate acquisition.

The Government quotes several statements made before the Senate Special Committee on Crime, which have apparently been culled out of a mass of testimony. The statements themselves, however, do not support the validity of the presumption in question. That one fourth of guns confiscated by police officers in N. Y. City had been "bootlegged into" the state (testimony of N. Y. City Police Chief, Gov't. brief p. 24) does not support a presumption of receipt in interstate commerce arising from possession. Rather it shows that the probalities are 3 to 1 the other way. Even this testimony is based on a factual situation, pertaining only to some states, and to a period 15 years prior to the passage of the act.

Not only is the Government's argument, that there is a presumption of interstate acquisition, invalid for the reasons discussed, but affirmative evidence in the case at bar negatives such a presumption (R. 11, 14).

There are thousands of firearms in Michigan having already come to rest both in the hands of dealers and of private persons, and it is, therefore, unreasonable to presume that the firearm possessed by Delia was received in interstate commerce rather than acquired locally within the state. The police officer expert, who testified in behalf of the Government, stated that the type of firearm possessed by Delia was in common display in the State of Michigan about 1920, and that at the time of trial was commonly possessed.

> "Q. And you have seen many, many guns similar to Government's Exhibit 3?
>
> A. In the last four or five years the big un of them is that type of gun" (R. 11).

> "Q. So along that time [1920] this type of gun, which is Government's Exhibit 3, was in common display in the State of Michigan?
>
> A. Oh, it was, yes; that is right" (R. 14).

Even if there were a rational connection between possession and receipt in intrastate commerce sufficient to support such a presumption, it could not be extended to include receipt subsequent to the effective date of the act. The Government admits that there is no probability in this regard (U. S. brief p. 39). However, the Government contends that if there were a rational connection between possession and receipt in interstate commerce, Congress had the power to "fill" this gap by means which might not be otherwise valid (U. S. brief pp. 40-42).

The cases cited by the Government do not support so much "filling." It is not the law that because two presumptions (that of interstate commerce and that of receipt subsequent to the effective date of the Act) are necessary to establish the elements of the offense and one is a reasonable presumption and the other unreasonable, that the unreasonable one will nevertheless be sustained merely because the statute would be otherwise unworkable.

We do not quarrel with the rule and the cases cited in support thereof that Congress may regulate purely intrastate acts where necessary to effectuate interstate regulation. Certainly we approve the decision of this court in *U. S. v. Darby*, 312 U. S. 100, sustaining the Fair Labor Standards Act. Regardless of whether Congress had the power to regulate possession of firearms within a state as a means of regulating interstate commerce (this problem is discussed in a later part of the brief), Section 2(f) is not and does not even purport to be such a regulation.

There is no relationship between the cases cited by the Government and the presumption that one in possession in 1941 of an article 21 to 41 years old received it subsequent to 1938. Nor can the act be construed as requiring one to create or preserve records of transactions prior

to the effective date of the act. Such an act would be clearly ex-post-facto.

The presumption of receipt subsequent to the effective date of the act is, of course, part of the total presumption. While we have followed the Government's division of the presumption into two distinct parts for the purpose of rebuttal, actually there is only one presumption and in the final analysis must be considered in its entirety.

The Government claims that there is rational connection between the mere possession in 1941 by Delia of a firearm manufactured between 1900 and 1920 and the offense of which he is charged, i.e., having received the firearm subsequent to July 30, 1938, in the course of interstate commerce. We submit that the presumption as a whole cannot be supported under the rational connection test either as to firearms or as to ammunition.

B. Unavailability of proof by the Government does not validate the presumption in Section 2(f).

The Government contends that even though there is no rational connection between the fact proven and that presumed, the presumption may be sustained solely on the ground that it is difficult for the Government to prove the defendant guilty, but easy for the defendant to prove himself innocent. The government contends that on the basis of this test it is valid to presume receipt of both firearms and ammunition not only in interstate commerce, but also subsequent to June 30, 1938 (U. S. brief pp. 26-29). It is not the rule that greater opportunity of knowledge and accessability of proof to the defendant is sufficient in and of itself to validate the presumption. These factors in and of themselves are not sufficient to sustain the validity of a presumption, but are only considered together with other factors. The cases cited by the government were not

decided on the exclusive consideration of opportunity of knowledge and accessability of proof.

The case of *Burnet v. Houston*, 283 U. S. 223, is not in point, and is cited apparently only to acknowledge authorship of a phrase. If a burden is upon a litigant, unavailability of proof is, of course, "a misfortune to be borne by him." The citation seems out of place, however, in the middle of an argument predicated entirely upon the fact, that because the Government cannot prove defendant guilty, this misfortune should be shifted to the defendant.

The Government relies apparently on *Yee Hem v. United States*, 268 U. S. 178; *Casey v. United States*, 276 U. S. 413; and *Morrison v. California*, 291 U. S. 82. None of the other cases cited in this section have any relation whatsoever to this point, and are apparently cited in support of other statements.

In the case of *Yee Hem v. United States*, 268 U. S. 178, it was clear that there was a rational connection between possession of opium more than 14 years after its importation into the country had been prohibited, and the presumed fact of concealment after importation. This decision was not based solely on greater opportunity of knowledge and accessibility of proof to the defendant.

In the case of *Casey v. United States*, 276 U. S. 413, the court specifically held that "With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed.' *Luria v. United States*, 231 U. S. 9, 25; *Yee Hem v. United States*, 268 U. S. 178, 183." This case also was not decided solely on the greater opportunity of knowledge and accessability of proof to the defendant.

The case of *Morrison v. California*, 291 U. S. 82, arose under a state statute which prohibited occupancy of land

for agricultural purposes by an alien ineligible for citizenship, and which further provided that upon proof of occupancy of land by any defendant the burden of proving citizenship or eligibility to citizenship developed on the defendant. This presumption was held invalid, because there was no rational connection between the occupancy of land by a defendant and his presumed lack of citizenship or eligibility thereto. "No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation" 291 U. S. 90.

Judge Cardozo referring to the effect of a disparity between the opportunity for knowledge of the prosecution and that of the defendant did not mean to imply that any presumption is valid merely because of such disparity. It was discussed as one consideration. "For the moment we assume, *without intending to decide*, that strong considerations of convenience, if they existed, *might* cast upon the tenant the burden of proving his qualifications and thus disproving guilt." 291 U. S. 94.

In any event, this test is applicable only in cases of general prohibition where the fact which the statute requires the defendant to prove is an exception to the general rule.

Wigmore on Evidence, Third Edition, Vol. IX. Sec. 2486, p. 275,
Greenleaf, Evidence, Vol. 1, Sec. 79.

In the instant statute receipt in intrastate commerce cannot be said to be an exception to a general regulation of acquisition or possession because Congress has no power to regulate purely intrastate transactions (See Section C following).

Even under the availability of proof test, Justice Cardozo makes it clear that a presumption will not be valid if there is a "probability of injustice to the accused" or "preponderating hardship to the defendant," 291 U. S. 94. He also makes it clear that the possibility of not being believed by the jury is an element to be considered in the "probability of injustice or preponderating hardship to the defendant," and not to be dismissed as a misfortune to be borne by him. "Moreover if he were to profess ignorance and ignorance were an excuse, *the trier of the facts might refuse to credit him*," 291 U. S. 98. Finally he concludes, that there may be a distinction between the rule in criminal and civil cases. "What has been written applied only to those provisions of the statute that prescribe the rule for criminal causes. Other considerations may or may not apply where the controversy is civil. We leave that question open," 291 U. S. 96, 97.

So it appears in any event, even in those cases where the greater opportunity of knowledge and accessibility of proof by the defendant may be a consideration, a presumption is valid only when it results in no "probability of injustice or preponderating hardship to the defendant," 291 U. S. 94. To pass legislation which by its very terms applies only to those previously convicted of a crime of violence and to declare them guilty unless they disprove the elements of the offense, which can be done only by their own testimony, does create a "probability of injustice and preponderating hardship to the defendant," because it is well known that "the trier of the facts might refuse to credit him" 291 U. S. 98.

While such persons are not entitled to special favors and are forced in many instances like others to run the risk of having their story disbelieved, a statute which applies only to such persons, creates a strong probability

of injustice and preponderating hardship to them and renders the statute invalid.

C. Section 2(f) cannot be construed as a general prohibition of all possession with an exception of receipt in (1) intrastate commerce or (2) interstate commerce prior to the effective date of the Act.

The Government contends "that if Congress had the intent and the power under the commerce clause to make it a substantive crime for men like defendant to possess guns or ammunition or to acquire them at all, its roundabout achievement of something less than that result by imposing a presumption of receipt in interstate commerce springing from possession is valid under the due process clause even if the inference of that particular sort of receipt be regarded as unfair or improbable" (U. S. brief, p. 33).

However, even if the argument of the Government should be accepted its conclusion can not be sustained because the facts do not support either of the conditions set forth in the argument. First, Congress had no power under the commerce clause to prohibit defendant from possessing a firearm or ammunition as a means of regulating subsequent interstate transportation or shipment, and second, it had no intention of doing so, if it had such power.

The theory of the Government that Congress could make unlawful possession of firearms or ammunition by one previously convicted of a crime of violence as a means of regulating probable subsequent interstate transportation of such articles, is remote and far fetched. (To support the Government's theory, the prohibition would have to apply to guns possessed before the effective date of the act as well as those received subsequent thereto.)

This alleged probability of subsequent interstate transportation of such articles is not a matter of common knowledge, nor is it supported by the figures relied upon by the Government in the footnote on page 36 of its brief.

The most favorable statistic to the Government is that 5.1% of all crimes and 13.8% of all gun crimes were committed by persons within the state less than one month. And this figure of 13.8% is based on a record of 16 out of 116 offenses committed in 1923, fifteen years before this act was passed. We submit the Government's figures are meaningless.

Congress made no finding of such a probability of subsequent interstate transportation. The facts recited in the brief of the Government make it clear that Congress did not believe that it had the power to regulate such possession on the ground that it might affect subsequent interstate transportation. On the contrary, it appears to be quite clear that while Congress desired to prohibit all possession, it decided that possession "is a matter within the power of the states and not the Federal Government." (U. S. brief p. 34.) Certainly this court cannot take judicial knowledge that the probabilities of subsequent interstate transportation are so great as to warrant federal regulation of possession in the face of such Congressional opinion.

If Congress had the power to regulate intrastate possession as a means of regulating subsequent interstate transportation, it did not intend to do so in this act and it should not be so construed by this court in the absence of such intent.

The mere reading of the statute and indeed the Governments own argument makes it clear that Congress had absolutely no intent of regulating all possession and con-

ferring an exception to those who received the firearm or ammunition in intrastate commerce or in interstate commerce prior to the effective date of the Act and did not even believe that it had such power. Had Congress possessed or believed that it possessed the power to regulate all possession as a means of regulating subsequent interstate transportation it is inconceivable that it would have granted such exceptions. The present act is not an "artificial or clumsy way" (*Ferry v. Ramsey*, 277, U. S. 94) on the part of Congress of regulating subsequent interstate commerce. The Act had it been based on such a power would have contained entirely different provisions.

The fact is that Congress intended to and did prohibit only receipt in the course of interstate commerce but in its zeal to secure compliance presumed violation from facts which had no rational or logical connection thereto. Even if it were possible for Congress to accomplish this objective by the exercise of other constitutional powers it cannot be said to have actually done so in this instance by a clumsy or artificial way and the statute cannot be construed as equivalent thereto.

To recapitulate: Even if the Government's argument were sound that the presumption should be sustained if Congress had the power to prohibit all possession and grant a limited exception to those who could prove receipt in intrastate commerce or receipt prior to the effective date of the act the presumption is nevertheless invalid because:

(1) Congress had no power to prohibit all possession: and

(2) If it had such power the present statute cannot be realistically construed as the exercise of such power with an exception.

D. Defendant can question the constitutionality of Section 2(f).

The Government contends that had Congress prohibited possession of a firearm or ammunition by one previously convicted of a crime of violence regardless of whether received in interstate or intrastate commerce under a supposed power to regulate its probable subsequent interstate transportation, that even if Congress did not have such power the statute would nevertheless apply to the extent of the constitutional power of Congress as a regulation of present receipt in interstate commerce and that defendant could not question the constitutionality of such a statute unless he could prove that he received the firearm or ammunition in other than interstate commerce.

Had Congress passed such a statute as that described, it would have been absolutely invalid and could not have been sustained by limiting its scope to a prohibition of only interstate receipt.

In the *Trade Mark Cases*, 100 U. S. 82, the court held:

> "It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further * * *. While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." (100 U. S. 98.)

In the case of *Yu Cong Eng v. Trinidad*, 271 U. S. 500, the court held:

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact and thus save the statute from invalidity." (271 U. S. 522.)

In the case of *Thornhill v. Alabama*, 310 U. S. 88, defendant was charged under a statute prohibiting loitering or picketing. This court in an opinion by Justice Murphy held that the statute as construed by the state court was violative of freedom of speech and the press. It was argued by the State that defendant could "not complain of the deprivation of any right but his own." 310 U. S. 96. The court held:

> "An accused after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and evidence introduced against him." 310 U. S. 98.

The rule invoked by the Government is the well known rule that "only those who have been injured as a result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions." (*Voeller v. Neiston Co.*, 311 U. S. 531, 537.) Can there be any question that defendant in the case at bar was sufficiently injured to entitle him to question the validity of the statute?

If the Government's argument were sound, any presumption would be constitutional, provided only that the

ultimate fact presumed were within the court's constitutional power, because in any such case the Government could have prohibited the act upon which the presumption was based, and require the defendant to prove that the act which he committed was not within the constitutional power. Under such a rule the federal courts could always presume jurisdiction.

E. The presumption in its entirety is invalid.

In the final analysis, the determination of "due process," which is involved, is not and should not be determined by fancy, legalistic, artificial tests and arguments. Due process is not a mathematical formula, but is the requirement of a fair trial, that kind of trial which is in accordance with our tradition of justice. Defendant was found in possession of a firearm manufactured from 21 to 41 years ago (R. 12) and ammunition manufactured between five and ten years ago (R. 13). Firearms of this type have been common in the state of Michigan at least since 1920 (R. 14) and are still common (R. 15). The ammunition could, of course, be lawfully and easily obtained by defendant within the state of Michigan. The statute made it a crime for defendant to receive this firearm with the ammunition contained therein in interstate commerce, subsequent to June 30, 1938, and then presumed such receipt from the mere fact of possession. The Government concedes that as to the ammunition there is no rational connection between possession and receipt in interstate commerce and also concedes that as to the firearm there is even greater probability of receipt by the defendant prior to June 30, 1938, than subsequently thereto.

Notwithstanding the lack of probabilities, the statute required defendant to prove his innocence by proving

receipt in intrastate commerce or receipt prior to the effective date of the act. It is inherent in the situation that such persons as defendant will have to rely almost entirely on their own testimony and that such testimony is not likely to be believed by the jury. Such a burden of proof is unfair.

Finally we observe that there is no public policy the effectuation of which is dependent upon the validity of this presumption. Without Section 2(f) the Federal Firearms Act remains a comprehensive and workable statute and controls actual interstate shipment and transportation of firearms and ammunition. The regulation of possession of firearms and ammunition which this section indirectly seeks to accomplish is a police power which can and should be exercised by the states. It is not a matter that requires regulation by the Federal Government. State laws can and do regulate such possession to whatever extent its people desire.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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March, 1943.

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 636

UNITED STATES OF AMERICA,
Petitioner,
vs.
FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The *amicus curiae* appears (by appointment of the trial court) as counsel for the defendant in *United States v. Minski*, No. 637, now pending in this Court on Petition for Certiorari filed by the United States. The constitutional questions involved in the *Delia* and the *Minski* cases are to

a considerable extent identical, and the two cases were disposed of in one opinion by the Circuit Court of Appeals (131 Fed. 2d 614). The *amicus curiae* files this brief through the courtesy of counsel in the case, because of the importance of the questions involved.

QUESTIONS PRESENTED

1. Whether Section 2 (f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

2. Whether said Section 2 (f) is unconstitutional under Article I, Section 9 (3) forbidding *ex post facto* laws.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment in pertinent part provides:

> "No person shall be * * * subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law * * *."

Article I, Section 9 (3) provides:

> "No * * * ex post facto law shall be passed."

SUMMARY OF ARGUMENT

I. The presumption clause of Section 2 (f) of the Federal Firearms Act is unconstitutional because it denies due process of law. There is no rational connection between the proved fact (possession of the firearm) and the presumed fact (acquisition in interstate commerce). *Mobile R. R. Co. v. Turnipseed*, 219 U. S. 35. The mere possession of a firearm or ammunition by a person who has been convicted of a crime of violence establishes no

logical probability that he has received the firearm in interstate commerce. Congress had no adequate ground for assuming such probability; but in view of its anxiety to minimize interstate traffic in firearms on the part of ex-convicts, chose to establish such probability by legislative fiat. The presumption has no basis in ordinary experience, and the proved fact does not point logically to the presumed fact.

II. There is even less rational connection between the ex-convict's possession of a firearm and the presumption that he acquired it subsequent to the effective date of the Act.

III. If these presumptions are unreasonable, it is no answer to say that the conveniences of proof require the defendant to explain his possession of the firearm. The decisions of this Court clearly set forth two requirements with reference to such legislation:

(1) That there be a logical and rational connection between the proved fact and the presumed fact: *and*

(2) That the presumption be rebuttable, and not conclusive.

Both of these requirements must be met if the legislation is to be upheld. An unreasonable presumption will not be sustained merely because it is rebuttable.

IV. Petitioner concedes to some extent the irrationality of the presumption, but urges the following points:

A. Congress had power to prohibit even the possession of firearms by ex-convicts, on the ground that such persons are likely to move from one state to another; citing *United States v. Darby*, 312 U. S. 100, 118. Therefore, inasmuch as Congress had this

larger power, it also had the right to exercise the less extensive power asserted in the present presumption clause. *Ferry v. Ramsey*, 277 U. S. 88. These two decisions do not support Petitioner's position. In the first place, there is no *probability* that ex-convicts possessing firearms will move from one state to another. In the second place, the regulation of mere possession of firearms, whether by ex-convicts or by other persons, is exclusively within the police power of the respective states. Even accepting the interpretation of *Ferry v. Ramsay*, adopted by Petitioner, there is in the present case no factual background that warrants application of such interpretation.

B. The defendant was required to prove he had acquired his gun in an intrastate transaction before he could complain of any invalidity in the Statute. *Williams v. Walsh*, 222 U. S. 415. Here again, Petitioner bases his argument on the untenable assumption that Congress would have the right to penalize mere possession of a firearm by an ex-convict. Even so, the defendant as an ex-convict is within the class of persons with respect to which the Act is unconstitutional.

V. Section 2 (f) is also unconstitutional for the following reasons:

A. The section is so vague and indefinite that it is impossible to determine just what acts are prohibited. More specifically, it is impossible to decide whether the firearm must have been received by the defendant in the course of interstate commerce, or whether he need only have received a firearm which at some previous time had been transported by another person in interstate commerce.

B. The section violates Article I, Section 9 (3) of the Constitution because it is *ex post facto* legislation, and it also violates the Fifth Amendment in that it subjects defendant "for the same offence to be twice put in jeopardy of life or limb." The defendant, who has already been punished once for his former crime, is now punished a second time by the imposition of a material disadvantage in the form of the presumption.

C. The section further violates the due process clause because it denies a fair trial to the ex-convict. He is ordinarily compelled to do one of two things: either to stay off the witness stand, in which case the presumption will result in his conviction; or to choose the greater evil and take the stand. If he does this, his criminal record, which has already been placed before the jury as part of the Government's direct case, will be emphasized on cross examination. His credibility, for all practical purposes, is destroyed in the eyes of the jury; and unless he is so fortunate as to be able to produce strong outside testimony, he is certain to be convicted. The section, in effect, makes a mockery of the constitutional privilege of all defendants, that they be presumed innocent, until proved guilty. The section is an invaluable weapon to enforcement officers, and in operation practically insures conviction. But however effective the procedure may be, and however commendable the motives of Congress in seeking to stop interstate traffic in firearms, the sacrifice of the fundamental right to a fair trial cannot be justified.

ARGUMENT

I.

THE PRESUMPTION OF SECTION 2 (f) DENIES DUE PROCESS OF LAW

The principal question involved is a relatively simple and narrow one: namely, whether the presumption of interstate commerce is rational and reasonable, or whether, on the contrary, it is illogical and arbitrary. If the former, the presumption is constitutional; if the latter, it is unconstitutional.

A. The Law

The governing principle is set forth in *Mobile Railroad Company v. Turnipseed*, 219 U. S. 35, 43:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a *purely arbitrary mandate. So, also*, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed." (Italics ours.)

The following are the other principal cases, following this rule:

1. Cases holding the connection arbitrary and unreasonable.

McFarland v. American Sugar Refining Company, 241 U. S. 79: in which a presumption of a monopoly or com-

bination in restraint of trade, arising out of payment of a lower price in Louisiana than elsewhere, was held arbitrary. The Court said (p. 86):

> "The presumption created here has *no relation in experience to general facts*. It has no foundation except with tacit reference to the plaintiff. But is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." (Italics ours.)

Manley v. Georgia, 279 U. S. 1: in which a presumption of guilt on the part of bank directors, arising from mere inability of the bank to pay its debts, was held arbitrary and unreasonable. The Court said (p. 6):

> "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

Western Railroad v. Henderson, 279 U. S. 639: in which a presumption of negligence from the mere fact of collision was held arbitrary and invalid.

Morrison v. California, 291 U. S. 82: in which a presumption of guilt from mere occupation of land was held arbitrary and invalid.

2. Cases holding the connection logical and reasonable.

Luria v. United States, 231 U. S. 9: in which a presumption of lack of intention to become a citizen, arising out of taking up permanent residence in a foreign country, was upheld.

Hawes v. Georgia, 258 U. S. 1: in which a presumption of guilty knowledge, arising from the presence of a whisky still on the premises, was upheld on the theory that it might reasonably be presumed that the occupant

of a farm would know what was on it. In other words, there was a natural relation between the proved fact (that is, occupancy of the land) and the presumed fact (that is, knowledge of a still on the land).

Yee Hem v. United States, 268 U. S. 168: The statute provided that after July 1, 1913, all smoking opium found within the United States should be presumed to have been imported after April 1, 1909, "and the burden of proof shall be on the claimant or the accused to rebut such presumption." The Court said (p. 184):

> "We think it is not an illogical inference that opium, found in this country more than four years (in the present case, more than fourteen years) after its importation had been prohibited, was unlawfully imported. Nor do we think the further provision, that possession of such opium, in the absence of a satisfactory explanation, shall create a presumption of guilt, is 'so unreasonable as to be a purely arbitrary mandate.'"

Casey v. United States, 276 U. S. 413; in which a presumption of guilt, arising out of possession of a package of opium to which the required stamps were not affixed, was upheld as logical and reasonable. This Court divided on the point.

See also notes in *51 A. L. R.*, 1139 and *86 A. L. R.* 179.

• • • • •

As was pointed out by Mr. Justice Cardozo in *Morrison v. California, supra*, the foregoing principle of reasonableness of connection cannot be "crowded into a formula"; and the decision must apparently rest upon the nature of the presumption created by each particular statute.

In many of the cases above cited, the connection between the proved fact and the presumed fact was an ob-

vious one, as in *Hawes v. Georgia, supra.* In the opium cases, the unlawfulness of the drug was generally known, as well as the fact that all opium must presumably have been imported into this country; and therefore a fair presumption of guilt might attach to possession of the drug. In the *Luria* case the taking-up of permanent residence in a foreign country might logically raise a presumption of a lack of intention to become a United States citizen.

On the contrary, where the connection was illogical, this Court has not hesitated to declare the legislation unconstitutional. For example, in the *Manley* case the Court construed a Georgia statute, which made the proved fact of a bank's insolvency *prima facie* proof of the guilt of its directors, as being contrary to the due process clause of the Federal Constitution.

B. The presumption clause of Section 2 (f) is unreasonable and arbitrary.

The process of reasoning adopted by the section is somewhat as follows:

(a) The defendant was once convicted of a crime of violence;

(b) He was in possession of a firearm;

(c) *Therefore,* such firearm was presumably received by him in interstate commerce.

We respectfully contend that this presumption is an obvious *non sequitur*, and that no rational connection exists between the proved facts and the presumed fact.

Under Section 2(b), the law-abiding citizen is not presumed to have received the firearm in interstate commerce; but under Section 2(f), an ex-convict is so presumed. Admittedly, the ex-convict's possession of a weapon might

reasonably raise certain inferences—for example, that he intended to use it unlawfully; but such possession raises no presumption at all as to the source from which he obtained it.

To our way of thinking, an ex-convict is just as likely to secure a revolver within the State of Michigan as he is to have it shipped to him from outside the state. More likely, we should suppose: a local purchase would ordinarily be quicker and more convenient. In any case, if he wants a gun, he will try to secure it from whichever source happens to be more available at the moment.

C. Congress had no adequate grounds for believing the presumption was logical and reasonable.

Counsel for Petitioner stresses the following points (Brief, pages 18-26):

1. The revolver in this case was made in Massachusetts, and must therefore at some time have reached Michigan in interstate commerce. But this circumstances affords no support to the claim that defendant himself imported the gun in interstate commerce. Furthermore, as the court below said, the same presumption obtains in the New England States, in spite of the fact that most of the firearms industry is located in that section of the country. Thus, if the defendant had been arrested in Massachusetts, possessing a firearm made in Massachusetts, the presumption would nevertheless apply. The Act cannot be valid in Michigan, and invalid in Massachusetts.

2. Petitioner calls attention to the Michigan Statutes, regulating the possession of firearms, and asserts that inasmuch as defendant would be violating Michigan law if he acquired the gun within the State, an inference follows that he probably acquired it from outside the State. But there is little distinction between Michigan

laws and federal laws on this point. Let us assume that defendant would have violated Michigan law by acquiring his gun intrastate, and also that any intrastate transferor would have violated Michigan law by transferring the gun to defendant. But similarly, the Federal Firearms Act (Section 2(d)) makes it unlawful for any person to transport firearms to any other person, knowing or having reasonable cause to believe "that such other person has been convicted of a crime of violence"; and of course it is also unlawful under Section 2(f) for any person who has been convicted of a crime of violence to receive any such firearm which has been shipped in interstate commerce. Thus, the transaction is equally unlawful under Michigan and Federal Statutes, both as to the transferor and the transferee; and it cannot persuasively be urged that the ex-convict would prefer to violate Federal law. Therefore, no presumption arises out of the existence of Michigan statutes. And obviously, the chances are that ex-convicts, who wish to obtain guns, will secure them wherever they can find them, without particular thought as to which statute is involved. If they can acquire them within the State, they will do so; if, on the contrary, they have an opportunity to acquire them from outside the State, they will probably follow that method. As the Circuit Court of Appeals said, "one guess is as good as another"; and accordingly no presumption arises, one way or another.

As to ammunition, Petitioner points out that there are no Michigan statutes regulating its sale or possession; and therefore, no presumption could possibly arise in this respect.

3. But Petitioner further urges that Congress had other adequate grounds for believing it likely that acquisition of firearms by ex-convicts ordinarily involves inter-

state commerce (Brief, page 23-26). An examination of the statistics supplied by Petitioner leads to exactly the contrary conclusion, however. The fact that a small percentage of guns was imported into New York and Michigan in interstate commerce does not warrant the presumption that the firearm was probably so imported in the present case. The data before Congress, in so far as it is set forth in Petitioner's Brief, indicates merely the *possibility* of interstate acquisition, rather than the *probability;* and it is only the *probability* of acquisition that would justify Congress in enacting the presumption clause of Section 2(f).

And may it not be further said that the validity of such presumptions does not depend upon what Congress may have thought, or upon the motives of Congress? On the contrary, the presumption should stand or fall by the test of whether or not it is based on common experience and understanding. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86.

II.

THE PRESUMPTION OF SECTION 2 (f) LIKEWISE DENIES DUE PROCESS, IN THAT IT PRESUMES RECEIPT SUBSEQUENT TO THE EFFECTIVE DATE OF THE ACT

The Federal Firearms Act was passed on June 30, 1938, and became effective July 30, 1938. Defendant herein was accused of receiving and possessing his gun in 1941, approximately three years later. The gun was at least twenty years old at that time. The Government introduced no proof whatsoever that the defendant had acquired the firearm after the effective date of the Act, but relied upon the presumption that he had acquired same unlawfully—that is, after such effective date.

It is readily apparent that there is even less logical connection between his possession of the gun and the presumption that he acquired same after July 30, 1938, than there is between his possession and the presumption that he acquired the gun in interstate commerce. On this point, the presumption is manifestly based, not on any semblance of actual experience, but merely on legislative fiat.

Petitioner does not seriously dispute this (Brief, pp. 38-39).

III.

THE INVALIDITY OF THE PRESUMPTION CLAUSE IS NOT CURED BY THE FACT THAT IT IS REBUTTABLE

In *Mobile Railroad Co. v. Turnipseed*, 219 U. S. 35, 43, the Court, after stating that there must be some rational connection between the fact proved and the fact presumed, said:

> "*So, also*, it must not, under guise of regulating the presentation of evidence operate to preclude the party from the right to present his defense to the main fact thus presumed." (Italics ours.)

This language is quoted, or the same principle stated, in the following cases:

Manley v. Georgia, 279 U. S. 1;
Western R. R. Co. v. Henderson, 279 U. S. 639;
Morrison v. California, 291 U. S. 82;
Hawes v. Georgia, 258 U. S. 1;
Yee Hem v. U. S., 268 U. S. 168.

From the foregoing, it appears clear: first, that there must be a rational connection between the proved fact and the presumed fact; *and* second, that the presumption must

be rebuttable. Thus, even if the presumption is a reasonable one, it may not be made conclusive. Similarly, if the presumption is an unreasonable one, the fact that it is rebuttable will not save it from unconstitutionality. It follows that if the presumption clause of Section 2(f) is unreasonable, as we have argued, then its rebuttability is immaterial.

This much seems beyond dispute. For if the correct rule were otherwise, it would follow that no matter how unfair and even ridiculous the presumption, it would have to be sustained, provided the accused was given an opportunity to rebut it. This, clearly, cannot be the law.

As we shall argue later, the opportunity thus given to the ex-convict to rebut the presumption is not of much value to him. His criminal record is already before the jury, and will be further paraded on cross-examination: with the inevitable result that no story he may tell will be believed by the jury.

In *Morrison v. California, supra*, there is an interesting discussion of a somewhat similar situation, and Mr. Justice Cardozo states (page 96):

> "There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People."

See also *Powers v. Indiana*, 204 Ind. 472 (1933), 184 N. E. 349; 86 A. L. R. 166: in which a presumption of intent to commit a felony, arising out of a failure to have a permit to carry a firearm, was held arbitary and invalid. The court said:

> "We cannot agree with the proposition that, if the Legislature gives a party a fair opportunity to establish his defense, and give evidence, the enact-

> ment is constitutional. Such a rule would require a defendant to prove himself innocent, notwithstanding the evidence against him, unsupported by legislative enactment, would not be sufficient to sustain a verdict of guilty."

Or, as was said by the lower court in the present case:

> "It follows, further, that if at the close of the Government's proof the accused seeks to defend himself, the burden is cast upon him of explaining a situation which up to that point had no incriminating tendency or effect."

IV.

THE PRESUMPTION CLAUSE CANNOT BE SAVED BY THE THEORY THAT CONGRESS MIGHT HAVE FORBIDDEN MERE POSSESSION OF FIREARMS BY EX-CONVICTS

A. Petitioner, citing *U. S. v. Darby,* 312 U. S. 100, 118, and *Ferry v. Ramsey,* 277 U. S. 88, builds up an elaborate theory that the presumption is valid, even though unreasonable.

Petitioner's theory, as we understand it, is somewhat as follows. Under the authority of the *Darby* case, Congress might have prohibited even the *possession* of firearms by ex-convicts, on the ground that such persons are likely to move from one state to another. Therefore, Congress also had the lesser power to forbid the interstate traffic in firearms and to couple the present presumption with such prohibition.

The *Darby* decision does not appear to support Petitioner's argument. This was a case involving the constitutionality of the Fair Labor Standards Act, of which Section 15(a) (2) requires employers to conform to the

wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. This Court held that the power of Congress extends to those intrastate activities which so affect interstate commerce as to make regulation of them appropriate means to the legitimate end; and further, that Congress may regulate intrastate activities when they have a substantial effect on interstate commerce.

Thus, Petitioner would have to make it clear that the possession of firearms by ex-convicts has a direct and substantial effect on interstate commerce. In other words, Petitioner would have to show that *most* ex-convicts habitually travel from one state to another. Petitioner's Counsel has not been able to do this. A perusal of the scanty statistics set forth in his Brief, page 36, indicates quite the contrary—namely, that only a small percentage of such ex-convicts habitually move from one state to another.

Indeed, in several places in his Brief, counsel calls attention to Congress' own doubts as to its power to pass any such legislation (See pages 14, 44).

It seems clear, even without citations, that the mere possession of firearms by ex-convicts is peculiarly a matter for state legislation and enforcement. The State of Michigan has legislated fully on this subject. One may go further and state that the present prosecution should properly have been in the Michigan courts, and that there was no reason to invoke federal jurisdiction.

See *Schechter Corp. v. United States*, 295 U. S. 495, 544. On page 546, Mr. Justice Hughes comments as follows:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all

> the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

The *Ferry* case involved a Georgia statute, which among other things made it unlawful for bank directors to assent to deposits in the bank after having knowledge of its insolvency; and which further provided that the fact of insolvency was *prima facie* evidence of knowledge and assent. By a divided opinion, this Court pointed out that the statute might have gone further than it did, and might have made directors liable in every case of insolvency. Mr. Justice Holmes' opinion seems to be based primarily upon the following language:

> "The essential thing is that • • • the statute has said if you take the office, you must take the consequences of knowledge whether you have it or not" (page 95).

The case was decided in 1928; and it is a curious circumstance that it does not appear to have been once cited by this Court during the intervening fifteen years.

But even if the *Ferry* case be interpreted as petitioner suggests, it is difficult to see how it controls the present situation. In the first place, as we have already pointed out, it is extremely doubtful, to say the least, that Congress would have power to exercise the larger power of penalizing mere possession of firearms; and if this is so, then the *Ferry* doctrine could not apply. In the second place the decision dealt only with a state statute, and the matter of interstate commerce was in no way involved.

It seems to us that the present case should be decided on the narrow issue of whether or not the presumption of Section 2 (f) is reasonable or unreasonable. It is not necessary to go far afield from this simple question, or

to attempt to solve the problem by a contemplation of what Congress might have done—probably without constitutional right.

B. Petitioner also makes the point (Brief, pages 44-48) that the defendant was required to prove he had acquired his gun in intrastate commerce before he could question the Act.

Here again, Petitioner's argument is based upon the assumption that Congress had power to prohibit mere possession of firearms by ex-convicts. If this assumption is incorrect, as we have attempted to show, then Petitioner's argument along these lines must fall.

But even accepting Petitioner's theory, it does not follow that this defendant cannot raise the question of constitutionality.

Section 2 (f) applies to a particular class of persons—namely, those who have been convicted of crimes of violence; and fugitives from justice. The presumption of interstate commerce applies only to such persons. With respect to all other classes, no such presumption arises; and it is necessary for the Government to prove that they received firearms in interstate commerce *with knowledge*.

Therefore, it would appear that all that need be shown by this defendant, in order to raise the question of the constitutionality of Section 2(f), is a prior conviction of a crime of violence. In other words, that he belongs to the class against which the presumption operates. But all this was proved by the Government itself.

The effect of Petitioner's theory would be to shift the burden to defendant in precisely the same way as does the present unreasonable presumption.

V.

THE SECTION IS UNCONSTITUTIONAL FOR THREE ADDITIONAL REASONS

A. It is so vague and indefinite as to constitute a denial of due process of law.

In *Connally v. General Construction Company*, 269 U. S. 385; 70 L. Ed. 322, this Court said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In *Yu Cong Eng v. Trinidad*, 271 U. S. 500, this Court said (page 522):

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute *reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact*, and thus save the statute from invalidity." (Italics ours.)

See also *Lanzetta v. New Jersey*, 306 U. S. 451.

Section 2 (f), defining the particular offense, provides that it shall be unlawful for any ex-convict to receive any firearm or ammunition "which has been shipped or transported in interstate or foreign commerce."

The subsection does not say "which has been shipped or transported *to him* in interstate or foreign commerce"; nor does it say it shall be unlawful for him to *receive* such firearm *in interstate or foreign commerce*. On the contrary, it is made unlawful merely to receive a firearm or ammunition "*which has been shipped* * * * in interstate or foreign commerce."

There would seem to be a fair inference that the offense includes the receipt by ex-convicts of firearms or ammunition which have been shipped or transported into the state *by other persons and to other persons at some previous time*.

B. The section is ex post facto legislation, and also places defendant in double jeopardy.

The defendant was additionally penalized in the present proceeding by virtue of the fact that some ten years earlier he had been convicted of a crime of violence. This additional penalty is in the imposition of a presumption of guilt. The ex-convict is not given the benefit of the same rule of evidence as the law-abiding citizen, who under Subsection (b) must be shown to have had *reasonable cause to believe* the firearm or ammunition had been transported in interstate commerce.

It may be argued that this contention has been decided adversely to us in several cases, on the theory that the additional disadvantage to the ex-convict is not in the nature of a punishment for his past crime, but only for the new crime. Habitual criminal acts in several states have been upheld on this ground.

McDonald v. Commissioner, 180 U. S. 311.

See also *16 C. J. S.* 901.

But we do not believe this reasoning is applicable to the Federal Firearms Act. Under habitual criminal acts, the

old conviction becomes pertinent *only in fixing the sentence* for the new conviction. Under these acts, the defendant is penalized *after his conviction for the new crime;* whereas under Section 2 (f) he is penalized *before* he is re-convicted, and therefore it cannot be said in any sense that he is being punished for a new crime, of which he has not yet been convicted.

In the instant case, the defendant was convicted of a crime of violence in 1930 and sentenced to prison. Presumably, he paid the penalty for his crime. Now he is brought to the bar a second time, and because of his former conviction, the presumption of interstate shipment arises against him. This is a serious disadvantage, and clearly constitutes an additional penalty for his former crime, for which he has already been punished once. Moreover, he is once more placed in jeopardy for his first offense.

The additional penalty, forbidden by the Constitution, may consist of any material disadvantage to the defendant. In *Lindsay v. Washington,* 301 U. S. 397, Mr. Justice Stone said (p. 401):

> "The Constitution forbids the application of *any new punitive measure* to a crime already committed, *to the detriment or material disadvantage* of the wrongdoer." (Italics ours.)

C. Section 2 (f) further violates the due process clause of the Fifth Amendment because it essentially denies a fair trial to the ex-convict.

One must view the present case from the assumption that the defendant is innocent until proved guilty. He has that right, regardless of his criminal record.

Another of his rights is the right to stay off the witness stand without prejudice. As every lawyer knows, it is

usually fatal for an ex-convict to take the stand in his own defense. Rightly or wrongly, the jury disbelieves him; and in many cases he is convicted, not for the present offense, but because he has a criminal record.

This is a different, and far more serious situation than that presented in civil cases, or even in criminal cases in which the prior criminal record of the defendant is not materially involved. Section 2 (f) finds its whole basis in the prior conviction of the defendant.

Let us consider the chances of the defendant for a fair trial. In the first place, the Government introduces testimony showing that he is an ex-convict. In the second place, once the Government has shown facts tending to show his possession of the gun, the presumption arises; and he must then take his choice of two evils. First, he can decide not to take the stand, and in that event he will be convicted because of the presumption. Second, he may decide to take the stand; and if he does so, the prosecution will naturally cross examine him fully with reference to his past criminal record. The almost inevitable result in either case is the conviction of the defendant.

His only hope is to produce irreproachable documentary evidence showing his acquisition of the gun in an intrastate transaction. Petioner (Brief, page 27) rather lightly asserts that the defendant may subpoena the seller of the weapon and his records; and further (Brief, page 29) that the defendant need only create a reasonable doubt in the jury's mind. Practically, this does not mean much. Ex-convicts do not, as Petitioner's Counsel himself suggests, transact business in quite the same meticulous way as business men. Thus, it would be an extremely rare thing for the defendant to be able to subpoena any records. The

same applies to his friends and associates; even if he can obtain their testimony, as in the *Tot* case (Docket No. 569), his witnesses are not likely to be believed.

If the Government says that this is the defendant's own fault, and that an ex-convict has no right to possess a gun, we must agree. But here we are dealing, not with defendant's moral obliquity, but solely with the propriety of federal jurisdiction. This offense is primarily a state matter; the Michigan Statutes amply cover the situation;* and prosecution should be under Michigan laws.

Congress' purpose in enacting the Federal Firearms Act was, of course, most commendable. There can be no question that state borderlines have handicapped local officials in coping with lawlessness. And there can be no question of Congress' rights to regulate interstate traffic in firearms. But the only question here involved is whether or not the presumption clause of Section 2 (f) is constitutional.

A public emergency, however real, cannot empower Congress to adopt arbitrary and artificial presumptions. As was said by Sir William Scott, *The LeLouis*, 2 Dodson, Adm. 210, 257, 165 Eng. Reprint, 1464, 1479 (quoted by Mr. Justice McReynolds, in *Carroll v. United States*, 267 U. S. 132, on page 163):

> "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice."

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*See Michigan Statute in Appendix.

Whatever may have been the purpose of Congress, the practical effect of Section 2 (f) is to throw the judicial weight heavily against the ex-convict—almost, in effect, to insure his conviction. The section may thus be an invaluable weapon to prosecuting officers, but the price of its unconstitutionality is too high: what usually happens is that the ex-convict does not receive that kind of fair trial and that sort of fair play which is the very essence of our jurisprudence.

As Mr. Justice Roberts said in *Lisenba v. California*, 314 U. S. 219, 236:

> "Denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

Even the ex-convict is entitled to fair play. The plain and ultimate fact, however, is that he does not receive it under Section 2 (f) of the Federal Firearms Act.

CONCLUSION

Finally, attention should be called to the curious character of the Federal Firearms Act, and to its unusual combination of aims and purposes. The Act is codified under "Commerce and Trade." Also, it is obviously a tax measure. Under these two disguises, it is also a criminal statute.

Somewhat the same situation obtained in *Casey v. United States*, 276 U. S. 413, in which Mr. Justice Butler, in dissenting, said (page 428):

> "And it is always to be remembered that this act is to be construed as a measure to 'lay and collect taxes.' It has no other legal existence. * * * It is hard to continue to say that this act is a taxing

measure in order to sustain it. Eagerness to use federal law as a police measure to combat the opium habit—a purpose for which Congress has no power to legislate—should not lead to the enactment or the construction of laws that shock common sense."

It is submitted that the judgment of the Circuit Court of Appeals in this case should be affirmed.

Respectfully,

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Dated: April 2, 1943.

APPENDIX

Michigan Statutes Annotated contain two analogous provisions:

> "28.424. Carrying concealed weapons without license. Sec. 227. Any person who shall carry a dagger, dirk, stiletto or other dangerous weapon except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him; and *any person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in any vehicle operated or occupied by him,* except in his dwelling house or place of business or on other land possessed by him, without a license to so carry said pistol as provided by law, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five (5) years, or by fine of not more than two thousand five hundred (2,500) dollars." (Italics ours.)

See also Michigan statutes referred to in Petitioner's Brief.